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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether criminal restitution orders are dischargeable "debts" in proceedings under Chapter 13 of the Bankruptcy Code?

LIST OF PARTIES

Petitioners are the Commonwealth of Pennsylvania, Department of Public Welfare and the Adult Probation and Parole Department of the Court of Common Pleas of Bucks County, Pennsylvania, which joins in this petition pursuant to Supreme Court Rule 19.4.

The respondents are Edward J. and Debora A. Davenport.

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The opinion of the Court of Appeals in the consolidated cases is reported at 871 F.2d 421 and is reprinted in the appendix at p. 1a-58a. The opinion of the District Court in Davenport v. Pennsylvania is reported at 89 B.R. 428 (E.D.Pa. 1988) and is reprinted in the appendix at p. 59a-66a. The opinion of the Bankruptcy Court in In re Davenport is reported at 83 B.R. 309 (Bankr. E.D.Pa. 1988) and is reprinted in the appendix at p. 68a-102a.

The District Court opinion in the companion case, Commonwealth of Pennsylvania, Dept. of Public Welfare v. Johnson-Allen, is reported at 88 B.R. 659 (E.D.Pa. 1988) and is reprinted in the appendix at p. 106a-124a. A District Court memorandum on standing is

reported at 81 B.R. 295 (E.D.Pa. 1987) and is reprinted in the appendix at p. 125a-130a. The opinion of the Bankruptcy Court in In re Johnson-Allen is reported at 69 B.R. 461 (Bankr. E.D.Pa. 1987) and is reprinted in the appendix at p. 131a-184a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was filed on March 28, 1989, and petitioners timely petitioned for rehearing. The Court of Appeals denied rehearing on April 27, 1989, Pet.App. 186a-18[illegible] and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

A. Provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

§ 101. Definitions

In this title -

. . . .

(4) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured....

. . . .

(9) "creditor" means -

(a) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;...

. . . .

(11) "debt" means liability on a claim....

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

. . . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty....

§ 1328. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; [debts provided for in the plan, but whose last payment date is after the last payment under the plan] or

(2) of the kind specified in section 523(a)(5) of this title [alimony and support obligation].

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

B. Provisions of the Public Welfare Code of Pennsylvania, Pa.Stat.Ann., tit. 62, §§ 101 et seq. (Purdon Supp. 1989))

§ 481. False statements; investigation; penalty

(a) Any person who, either prior to, or at the time of, or subsequent to the application for assistance, by means of

a wilfully false statement or misrepresentation, or by impersonation or by wilfully failing to disclose a material fact regarding eligibility or other fraudulent means, secures, or attempts to secure, or aids or abets or attempts to aid or abet any person in security assistance, or Federal food stamps, commits a crime which shall be graded as provided in subsection (b).

(b) Any person violating subsection (a) commits the grade of crime determined from the following schedule.

Amount of Assistance or Food Stamps	Degree of Crime
$3,000 or more	Felony of the third degree
$1,500 to $2,999	Misdemeanor of the first degree
$1,000 to $1,499	Misdemeanor of the second degree
$ 999 and under, or an attempt to commit any act prohibited in subsection (a)	Misdemeanor of the third degree

(c) Any person committing a crime enumerated in subsection (a) shall be ordered to pay restitution of any moneys he has received by reason of any false statement, misrepresentation, impersonation, failure to disclose required information or fraudulent means. Restitution ordered under this subsection may be paid in a lump sum, by monthly installments or according to such other

schedule as is deemed just by the sentencing court. Notwithstanding the provisions of 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property) to the contrary, the period of time during which the offender is ordered to make restitution may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crime of which he was convicted, if the sentencing court determines such period to be reasonable and in the interests of justice.

C. Provisions of the Crime Code of Pennsylvania, Pa.Cons.Stat., tit. 18, §§ 101 et seq. (1982).

§ 1106. Restitution for injuries to person or property

(a) General rule.--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender may be sentenced to make restitution in addition to the punishment prescribed therefor.

(b) Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole.

(c) Authority of sentencing court. -- In determining whether to order restitution as a part of the sentence or as a condition of probation or parole, the court:

(1) Shall consider the extent of injury suffered by the victim and such other matters as it deems appropriate.

(2) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just, provided that the period of time during which the offender is ordered to make restitution shall not exceed the maximum term of imprisonment to which the offender could have been sentenced for the crime of which he was convicted.

(3) May at any time alter or amend any order of restitution made pursuant to this section providing, however, that the court state its reasons and conclusions as a matter of record for any change or amendment to any previous order.

. . . .

(e) Restitution payment and records.-- Restitution, when ordered by a judge, shall be made by the offender to the probation section of the county in which he was convicted according to the order of the court.... The probation section shall maintain records of the restitution order and its satisfaction and shall forward to the victim the property or payment made pursuant to the restitution order.

(f) Noncompliance with restitution order. -- Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section shall notify the court within 20 days of such failure.... Upon such notice of failure to make restitution,... the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

(g) Preservation of private remedies. -- No judgment or order of restitution shall debar the owner of the property or the victim who sustained personal injury, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

(h) Definitions. - As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Crime." Any offense punishable under this title or by a district justice.

"Injury to property." Loss of real or personal property, including negotiable instruments, or decrease in its value, directly resulting from the crime.

"Offender." Any person who has been found guilty of any crime.

"Personal injury." Actual bodily harm, including pregnancy, directly resulting from the crime.

"Property." Any real or personal property, including currency and negotiable instruments, of the victim.

"Restitution." The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.

"Victim." Any person, except an offender, who suffered injuries to his person or property as a direct result of the crime.

NO.

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COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,

Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners respectfully ask the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This case presents the question of whether a criminal restitution order is a dischargeable "debt" within the meaning of the Bankruptcy Code. The Court granted certiorari to resolve this question in Kelly v. Robinson, 479 U.S. 36 (1986), but ultimately found it unnecessary to do so, deciding the case instead on a narrower ground not applicable here. Id., 479 U.S. at 50. This case again presents the issue presented but left unresolved in Kelly.

This case arises under Chapter 13 of the Bankruptcy Code. A debtor who successfully completes a Chapter 13 plan is entitled--with limited exceptions not here relevant--to a discharge of all "debts" as that term is defined in the Bankruptcy Code. 11 U.S.C. § 1328(a). The Code defines a "debt" as "liability

on a claim," and defines a "claim" as a "right to payment." 11 U.S.C. § 101(4), (11). The Court of Appeals held that a criminal restitution order is a "debt" within the meaning of the Bankruptcy Code, and hence dischargeable upon the completion of a Chapter 13 plan.

Kelly v. Robinson, supra, by contrast, arose under Chapter 7 of the Bankruptcy Code. A discharge under Chapter 7, like one under Chapter 13, affects only "debts," but the exceptions to a Chapter 7 discharge are broader than those to a Chapter 13 discharge. Cf. 11 U.S.C. § 727 with 11 U.S.C. § 1328(a). In Kelly, the Court held that one of those exceptions--codified at 11 U.S.C. § 523(a)(7)--excluded criminal restitution orders from a Chapter 7 discharge, Kelly, 479 U.S. at 50, and therefore found it unnecessary

to reach the broader question of whether such orders are "debts" in the first place. This case presents that issue.

1. The respondents, Edward and Debora Davenport, pled guilty to the crime of welfare fraud. See Pa.Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989); Pet.App. 5a. Each was sentenced to one year of probation; each was ordered to make restitution in the amount of $2,072.40 at the rate of $208.00 per month. Respondents were to send their payments to petitioner, Bucks County Adult Probation and Parole Department ("Probation Department"), which, in turn, was to forward restitution to one victim of the crime, petitioner, Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"). DPW would then share repayments with the federal government. See Pa.Stat.Ann., tit. 62, § 474 (Purdon 1968).

Instead of making any restitution payments, the Davenports filed a voluntary petition in bankruptcy under Chapter 13 in the United States Bankruptcy Court for the Eastern District of Pennsylvania. See 11 U.S.C. § 1301 et seq. The petition contained a schedule of creditors that listed, among others, DPW as having an unsecured debt based upon "public assistance overpayment." (C.A. App. 14).

Under the Davenports' Chapter 13 plan, all unsecured creditors were treated the same. When that treatment resulted in failure to make any restitution payments, the Probation Department began probation violation proceedings. The Davenports responded by filing an adversary proceeding in bankruptcy, against DPW and the Parole Department, to obtain a declaration that

the restitution order was a discharge-able "debt" and an injunction prohibiting the Probation Department from taking any further steps to collect the restitution. (C.A.App. 28).

2. The Bankruptcy Court held that a criminal restitution order was a dischargeable "debt" under Chapter 13 of the Bankruptcy Code and ordered that any payment made by the debtor be returned to the trustee in bankruptcy. In re Davenport, 83 B.R. 309 (Bankr. E.D. Pa. 1988), Pet. App. 70a et seq. The Davenports successfully completed their Chapter 13 plan, and the Bankruptcy Court discharged their debts. Pet. App. 8a.

The District Court reversed, holding that the restitution order was not a "debt." The District Court reasoned that discharge of restitution

orders would violate the important principles of federalism discussed in Kelly v. Robinson, supra, and also held that the victim of the crime--DPW--did not possess a "right to payment" of the restitution, which is a prerequisite to the existence of a "debt" under the Code. Pet. App. 59a-66a.

3. The Court of Appeals reversed and remanded with directions to affirm the order of the Bankruptcy Court. Pet.App. 1a-58a. The Court of Appeals conceded that the majority of bankruptcy courts considering the issue have rejected the contention that a criminal restitution obligation is a "debt" under that Bankruptcy Code; recognized that in Kelly this Court declared that it had "serious doubts" as to whether Congress intended criminal

restitution orders to constitute "debts"; and went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable debts. The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for

straight liquidation under Chapter 7." Pet. App. 31a. The Court of Appeals emphasized the broader discharge available under Chapter 13. "Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a) it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution." Pet.App. 38a.

Despite noting this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief.' Kelly, 479 U.S. at 49" (Pet.App. 40a), the Court of Appeals found that Congress, not the court, must

"cure any perceived 'defects' in [the Bankruptcy Code]"; defects "which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet.App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion. Pet. App. 58a, n.5.

4. In the Court of Appeals, this case was consolidated with two other cases in which the District Court had likewise held restitution orders not

to be dischargeable "debts." In neither case had those debtors, unlike the Davenports, yet completed their Chapter 13 plans or received a discharge.

The Third Circuit consolidated these cases with Davenport but disposed of them differently, holding that the dischargeability issue was not "ripe for resolution until the plan has been concluded and it is known which discharge provision[1] will apply." Pet. App. 12a-13a; citing In re Heincy, 858 F.2d. 548, 550 (9th Cir. 1988). Because of

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[1]A Chapter 13 debtor who successfully completes the plan, like the Davenports, would be entitled to a discharge under 11 U.S.C. § 1328(a). One who did not could only obtain a discharge under Section 1328(b). A Section 1328(b) discharge would, for these purposes, be identical to a Chapter 7 discharge--see 11 U.S.C. § 523(a)--and would be governed by Kelly v. Robinson. Pet. App. 12a.

this disposition, the debtors in those cases--Loraine Johnson-Allen and Ruby Steffler--are not named as respondents. The petitioners do not seek review of the decision in their cases, but the lower court opinions are included in the Appendix for the sake of completeness.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erroneously Decided an Important Question of Federal Law, Relating to the Administration of State Criminal Justice Systems, That Has Not Been, But Should Be, Decided by This Court

1. Reduced to its essence, the question in this case is whether Congress intended to allow convicted criminals to escape or minimize punishment by completing a Chapter 13 bankruptcy plan. The resolution of this issue will have a significant impact on the ability of federal and state governments to fashion punishment that meets the crime. See Brief of Amicus Curiae in Support of Petition. Restitution, "a central feature of victims' rights efforts in

America,"[2] is mandated in "twenty-seven states . . . unless the judge provides the justifications for not doing so,"[3] must be considered as a sentencing option in thirty states,[4] and is permitted in all states.[5] In Pennsylvania alone, the Court of Appeals' interpretation of the Bankruptcy Code will annually render unenforceable in excess of 5,000 criminal sentences of restitution--if

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[2]McGillis, Crime Victim Restitution: An Analysis of Approaches, (National Institute of Justice, J.S. Dept. of Justice, December, 1986), p. iii.

[3]Comment, Criminal Restitution as a Limited Opportunity, 13 New Eng. J. Crim. & Civ. Confinement 243, see n. 9.

[4]See id. at 243-244.

[5]Id.

the criminal chooses to file a Chapter 13 bankruptcy.[6]

This Court has often recognized the importance of the States' interest in administering their criminal justice systems free from federal interference, Younger v. Harris, 401 U.S. 42, 44-45 (1971), observing that this state interest is "one of the most powerful of the considerations that should influence a court considering equitable types of relief." Kelly v. Robinson, 479 U.S. 36, 49 (1986); United States v. Ron Pair Enterprises, Inc., No. 87-1043, slip op. at 8-9 (February 22, 1989).

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[6]In 1987, sentencing courts in Pennsylvania imposed restitution sentences in over 5,000 criminal cases according to statistics filed by the District Attorneys' Association of Pennsylvania with the Court of Appeals.

In Kelly, the Court recognized the potentially devastating effect on the criminal justice system of making criminal restitution dischargeable. Id., 479 U.S. at 46. The Court was concerned that state prosecutors would have to defend state criminal judgments in federal bankruptcy court, id. at 48; that bankruptcy courts could remit judgments imposed by state criminal judges, id. at 49; and that state sentencing judges' flexibility in fashioning the most appropriate criminal sentence would be restricted. Ibid. Accord, Pet. App. 54a-55a, n. 4, (Hutchinson, J., dissenting.) The Court of Appeals' decision allowing for dischargeability of criminal restitution makes the Court's concerns a reality.

In reaching its conclusion, the Court of Appeals misconstrued the statute, disregarded the views of the Kelly majority, and reached a decision at odds with those of other courts around the country.

2. The starting point in every case involving statutory construction is the language itself. Kelly, 479 U.S. at 43. The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment." 11 U.S.C. § 101(4). A "creditor" is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9).

Whether a "right to payment" exists is a question of state law. In re Frenville, 744 F.2d 332, 337 (3d Cir.

1984), cert. denied, 469 U.S. 1160 (1985). The Court of Appeals acknowledged that under Pennsylvania law an order of restitution does not establish a debtor-creditor relationship. Pet. App. 21a-22a. In Pennsylvania, restitution is not paid directly to the victim. Rather it is paid to the probation office. Pa. Cons.Stat.Ann., tit. 18, § 1106(e) (Purdon). Moreover, the victim cannot enforce the criminal restitution order -- only probation officers can initiate enforcement proceedings. 18 Pa.Cons.Stat. Ann. § 1106(f). Pennsylvania law does not authorize seizure of a debtor's property by probation officers and unlike provisions under the Model Penal Code § 302.2, unpaid amounts are not automatically collectible as civil judgments.

Pennsylvania's criminal restitution scheme is thus similar to the Connecticut scheme which the Court described in Kelly:

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Kelly, 479 U.S. at 41, quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D.Conn. 1984)(the companion case to Kelly).

The Court of Appeals apparently agreed that the victim does not possess a "right to payment" of the criminal restitution, but implied that the victim's right to payment of a civil claim satisfied that requirement. Pet. App. 21a-24a. Moreover, the Court of

Appeals held that the Probation Department's ability to enforce the obligation constituted a right to payment.

Following the analysis of the Second Circuit in In re Robinson, 776 F.2d 30 (3d Cir. 1985), rev'd sub nom; Kelly v. Robinson, 479 U.S. 36 (1986), rejected by this Court, the Court of Appeals--purportedly to protect victims--blurred the distinction between civil and criminal restitution. Of course, victims of crimes have common law and statutory rights to seek compensation directly from criminals and may file claims in bankruptcies. See Pa.Stat.Ann., tit. 18, § 1106(g). These facts, however, are independent from the incidental benefit received by a victim when a criminal sentence of restitution is entered. The enforceable civil right to payment is not a right to payment of the criminal order.

Nor does the Probation Department have a "right to payment" merely because it can institute probation violation proceedings. These facts alone, wholly apart from the other factors discussed below, make it apparent that the Court of Appeals' conclusion that a "right to payment" exists strained the plain language of the Bankruptcy Code.

2. The language should only have been the starting point of the Court of Appeals' analysis. The Court has held that the statutory definition of debt must be read "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." Kelly, 479 U.S. at 43-44. After doing just that, the Court expressed its "serious doubts" as to

whether Congress intended to make criminal penalties "debts," id. at 50, noting, that "nothing in the legislative history of these sections compels the conclusion of Congress intended to change the state of the law with respect to criminal judgments." Id. at 50, n. 12.

The Court of Appeals, however, declining to follow the Court's analysis of this issue, dismissed the Court's doubts as "founded upon factors other than the plain language of the statute." Pet. App. 26a-27a. The Court of Appeals preferred instead to rely upon the Second Circuit's decision in In re Robinson, rejected by this Court, and upon the dissent in Kelly.

3. Ironically, the Court of Appeals sought support for its holding from Kelly itself, arguing that the

holding in Kelly--that restitution orders are exempted from discharge--"compels the conclusion that restitution is a debt." Pet. App. 29a. This is supposedly so because only debts are subject to discharge and if "criminal" penalties were not debts there would be no need to except them from discharge. Pet. App. 29a, citing Kelly v. Robinson, 479 U.S. 36, 58 (Marshall, J. dissenting).

This argument does not square with the language of Kelly where the majority stated "we need not address that question in this case." Id. at 50. If one concludes otherwise, the Kelly decision becomes double talk--saying one thing and doing another. Surely, the Court was aware of the argument made by

the dissent when it expressed its "serious doubts" as to criminal restitution being a debt and the reasons behind those doubts and did not do so meaninglessly.

II. The Ruling of The Court Below Creates A Conflict Among the Circuits and Lower Federal Courts

The Third Circuit's decision stands in conflict with the approach taken by other Courts of Appeals. In United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982), for example, the Fifth Circuit found "untenable on its face" the notion that a prior discharge in bankruptcy of a debt created by a defendant's bank fraud prevented a federal criminal court from ordering the defendant, as a condition of his suspended sentence, to make restitution to the bank. On nearly identical facts, the Seventh Circuit reached the same conclusion. United States v. Alexander, 743 F.2d 472, 480 (7th Cir. 1984)("The bankruptcy proceeding is largely unconcerned with criminality.")

Other circuit courts have held that absent extraordinary circumstances a federal court should not enjoin state criminal proceedings that may result in a restitution order requiring the defendant to pay back a debt that may be discharged at the conclusion of pending bankruptcy proceedings. McDonald v. Burrows, 731 F.2d 294, 297-99 (5th Cir.), cert. denied, 467 U.S. 852 (1984); Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982).

Nondischargeability of criminal restitution is implicit in each of these circuit decisions and their approach therefore conflicts with the Third Circuit decision.

As the Third Circuit itself acknowledged, its decision that restitution is a debt also conflicts with the

majority of federal bankruptcy courts to have addressed the issue.[7] Pet. App. 17a. This Court should grant certiorari to resolve the conflict.

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[7]See In re Norman, 95 B.R. 771 (Bankr. D. Colo. 1988), and In re Johnson, 32 B.R. 614 (Bankr. D. Colo. 1983) (applying Colorado law in Chapter 13 bankruptcies); In re Magnifico, 21 B.R. 800 (Bankr. Ariz. 1982)(applying Arizona law in a Chapter 7 case); In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985)(applying Pennsylvania law to a Chapter 7 case); In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988)(applying Pennsylvania law to a Chapter 13 case); In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); and Robinson v. McGuigan, 45 B.R. 423 (Bankr. D.Conn. 1984)(applying Connecticut law to Chapter 7 bankruptcies) Cf. cases from states where a statutory right to payment exists for victims entitled to restitution: In re Heincy, 78 B.R. 246 (9th Cir. B.A.P.Cal. 1988), rev'd, 858 F.2d 548 (9th Cir. 1988)(applying California law in Chapter 13), and In re Newton, 50 B.R. 708 (Bankr. N.D.Ga. 1987)(applying Georgia law in Chapter 13 to conclude that restitution is a debt, but is nonetheless not subject to discharge.)

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1610

IN RE: LORRAINE JOHNSON-ALLEN

Commonwealth of Pennsylvania
Department of Public Welfare

v.

Lorraine Johnson-Allen

IN RE: RUBY STEFFLER a/k/a
INGRID J. STEFFLER

Commonwealth of Pennsylvania
Department of Public Welfare

v.

Ruby Steffler a/k/a
Ingrid J. Steffler
Lorraine Johnson-Allen and
Ruby Steffler,

Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Civil No. 87-1032

NO. 88-1635

IN RE: EDWARD AND DEBORA DAVENPORT

Edward and Debora Davenport

v.

Commonwealth of Pennsylvania,
Department of Public Welfare and Court
of Common Pleas of Bucks
County, and Edward Sparkman, Trustee

Edward and Debora Davenport,
Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Civil No. 88-3177

Argued December 12, 1988
Before: GIBBONS, Chief Judge,
HUTCHINSON and ROSENN,
Circuit Judges

Opinion Filed March 28, 1989

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OPINION OF THE COURT

ROSENN, Circuit Judge.

These consolidated appeals raise an important issue, particularly for governmental agencies engaged in public assistance, of whether criminal restitution imposed as a penalty for welfare fraud constitutes a debt dischargeable under Chapter 13 of the Bankruptcy Code, 11 U.S.C.A. § 1301, et seq. (West 1979 & Supp. 1988). The bankruptcy court, in two separate

opinions, held that restitution obligations constitute dischargeable debts under Chapter 13. Appellees, the Pennsylvania Department of Public Welfare (DPW) and the Court of Common Pleas of Buck County, Adult Probation and Parole Department, (collectively, the State), appealed, and the United States District Court for the Eastern District of Pennsylvania reversed. Debtors appealed to this court.[1] We reverse the judgments of the district court.

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[1]This court has jurisdiction over the appeals by virtue of its authority to review final orders of the district court in accordance with 28 U.S.C. § 158(d).

I.

The facts in these cases are not in material dispute. On September 17, 1985, the Davenports entered guilty pleas to the crime of welfare fraud in Bucks County, Pennsylvania Common Pleas Court. Each was sentenced to one year probation and was ordered to make criminal restitution payments of $208 per month, beginning in December 1986, until a total of $2,072.40 had been remitted. Payments were to be sent to the County Probation Department which, in turn, was to forward them to the DPW.

On May 25, 1987, the Davenports filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The criminal restitution obligation, listed as an unsecured debt payable to the DPW, was to receive treatment equal to other

unsecured creditors under the plan. When the Davenports failed to make restitution payments as originally ordered, the Probation Department commenced violation of probation proceedings. The Davenports notified the Probation Department on July 20, 1987, of the pending bankruptcy proceeding, and requested withdrawal of the probation violation charges. When the Probation Department refused to withdraw the charges, the Davenports commenced an adversary action in the bankruptcy court seeking a declaration as to the dischargeability of the criminal restitution obligation.

On October 20, 1987, the bankruptcy court confirmed the Davenports' Chapter 13 plan without objection from any creditor and with the express approval of the standing Chapter

13 trustee. On October 19, 1987, the Probation Department proceeded with a violation of probation hearing in Bucks County. The Common Pleas Court denied the motion to revoke probation, declaring that the restitution order "still stands."

Following trial on the issue of dischargeability, the bankruptcy court held that the restitution obligation was dischargeable under Chapter 13. In re Davenport, 83 B.R. 309 (Bankr. E.D. Pa. 1988). On appeal, the district court reversed, holding that the restitution obligation was not a debt as defined by the Bankruptcy Code, and that a discharge would violate principles of federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971). Davenport v. Pennsylvania, 89 B.R. 428 (E.D. Pa. 1988). On

July 8, 1988, after successfully completing their Chapter 13 plan, the bankruptcy court discharged the Davenports under Chapter 13, 11 U.S.C.A. § 1328(a).

In a separate prosecution, Lorraine Johnson-Allen pleaded guilty in a state court to four counts of welfare fraud on June 18, 1985. The court subsequently sentenced her to probation and ordered restitution of $6,300 which was to be paid in ten dollar monthly installments. Johnson-Allen continued payments until she filed her bankruptcy petition under Chapter 13 on March 14, 1986. Like the Davenports' plan, Johnson-Allen's Chapter 13 plan listed the DPW as an unsecured creditor and provided for payments to be paid to the DPW in amounts equal to all other general unsecured creditors. Johnson-Allen advised the DPW and the Philadelphia County Probation Department of

the filing, stating that she believed, on advice of counsel, that the filing stayed collection of the restitution obligation and that the obligation would be discharged upon completion of the plan payments. On advice from the Probation Department that the payments were not stayed, Johnson-Allen resumed payments pending disposition of this proceeding. On February 11, 1987, no objections having been filed, the bankruptcy court confirmed Johnson-Allen's plan. No one appealed from the confirmation of the plan.

In a third prosecution in a state court, Ruby Steffler also pleaded guilty to welfare fraud on January 17, 1984. The court placed her on probation and ordered her to make restitution in the amount of $5,506.64, in payments of twenty dollars per month. Steffler also

filed a bankruptcy petition under Chapter 13, listing the DPW as an unsecured creditor and accorded the DPW treatment equal to that of the other unsecured creditors. Shortly after filing, she informed the County Probation Department that she would cease restitution payments. However, upon institution of violation of probation proceedings, Steffler resumed her payments. On May 15, 1987, the bankruptcy court confirmed, without objection, her Chapter 13 plan, and no creditor appealed from the confirmation order.

The bankruptcy court consolidated the Steffler and Johnson-Allen proceedings. The court granted summary judgment for both debtors, holding that the restitution obligations were dischargeable under Chapter 13. In re Johnson-Allen, 69 B.R. 461 (Bankr. E.D.

Pa. 1987). On appeal, the district court reversed, again holding that discharge would interfere with the well-established principles of comity and federalism stated in Younger. Pennsylvania Dept. of Public Welfare v. Johnson-Allen, 88 B.R. 659 (E.D. Pa. 1988).

II.

The threshold issue in this case is whether the dischargeability issue is ripe for determination. If a debtor completes payments under the Chapter 13 plan, discharge of debts is controlled by 11 U.S.C.A. § 1328(a). As discussed infra at Section III B, such discharge would encompass restitution obligations. However, if the debtor fails to complete payments, section 1328(b) controls which would preclude discharge of the restitution order. See Kelly v. Robinson, 479 U.S. 36, 53 (1986). The Court of Appeals for the Ninth Circuit recently held under similar facts that the dischargeability issue is not ripe for resolution until the plan has been concluded and it is

known which discharge provision will apply. In re Heincy, 858 F.2d 548, 550 (9th Cir. 1988); see also In re Carroll, 61 B.R. 178, 179 (Bankr. D. Ore. 1986).

We adopt the reasoning of the Ninth Circuit. Because neither Steffler nor Johnson-Allen has completed the Chapter 13 plan, the issue of dischargeability is not ripe, and we will therefore reverse and remand to the district court with directions to dismiss their appeals without prejudice for lack of an appealable order. However, because the Davenports have completed payments under their Chapter 13 plan and have received a discharge of their debts under 11 U.S.C.A. §1328(a), the dischargeability issue is ripe for resolution by this court. We therefore turn now to the merits of that issue with respect to the Davenports' claims.

III.

The critical issue before this court -- whether the restitution obligation is a dischargeable debt -- is comprised of two separate and distinct sub-issues. First, whether the restitution obligation constitutes a debt under the Code? Second, assuming the obligation is a debt, whether that debt is dischargeable under Chapter 13 upon completion of payments under the plan? Because resolution of these issues involves questions of law, our review is plenary.

A.

The Bankruptcy Code defines a "debt" as a "liability on a claim," and further defines a claim as "a right to payment." 11 U.S.C.A. §§ 101(11), 101(4)

(West 1979).[2] In determining whether an obligation constitutes a claim within the meaning of the Code, Congress advised that the definition of claim is to be given the

> broadest possible definition . . . that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

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[2]The Code defines a claim as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101(4).

H. Rep. No. 595, 99th Cong., 2d Sess. 309, reprinted in 1978 U.S. Code Cong. & Admin. News at 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. Code Cong. & Admin. News 5785, 5807-08. This advice has been well taken by the courts. See, e.g., Ohio v. Kovacs, 469 U.S. 274, 279 (1985); In re Remington Rand Corp., 836 F.2d 825, 829 (3d Cir. 1988). In addition, Congress intended the concepts of "claim" and "debt" to be coextensive. See House Report at 310, reprinted in U.S. Code Cong. & Admin. News at 6267; Senate Report at 23, reprinted in 1978 U.S. Code Cong. & Ad. News at 5809; see also In re Robinson, 776 F.2d 30, 36 (2d Cir. 1985), rev'd on other grounds sub nom. Kelly v. Robinson, 479 U.S. 36 (1986); Kelly, 479 U.S. at 58 (dissent).

Notwithstanding the overwhelming acceptance of the broad nature of the term "claim," the majority of bankruptcy courts have rejected the contention that restitution obligations are "debts" within the meaning of the Code. See, e.g., In re Kohr, 82 B.R. 706, 712 (Bankr. M.D. Pa. 1988); In re Thompson, 77 B.R. 646, 648 (Bankr. E.D. Tenn. 1987); In re Oslager, 46 B.R. 58, 62 (Bankr. M.D. Pa. 1985); In re Pelligrino, 42 B.R. 129, 132 (Bankr. D. Conn. 1984); In re Johnson, 32 B.R. 614, 616 (Bankr. D. Colo. 1983); In re Button, 8 B.R. 692, 694 (Bankr. W.D.N.Y. 1981). Without resolving the issue, the Supreme Court recently lent this position some credence when it declared that it had "serious doubts" as to whether Congress intended restitution obligations to constitute debts. Kelly, 479 U.S. at 50.

The conclusions drawn by the foregoing bankruptcy courts rest primarily upon combinations of five different arguments relating both to the definition of debt and to dischargeability of criminal penalties. Those arguments include: (1) the victim does not personally possess a right to the restitution payment as ordered by the court; (2) a discharge of restitution interferes with state criminal proceedings, violating well-established principles of federalism; (3) Congress revised the Code in 1978 against the background of a judicially created exception for the discharge of criminal penalties; (4) discharge of the restitution obligation would create a "haven for criminals" in contravention of congressional intent; and (5) restitution is intended primarily to rehabilitate the offender and not to

compensate the victim. Although we agree that facially there is considerable merit to these arguments, we are constrained to disagree with the ultimate conclusion that the restitution obligation is not a debt under the Code.

As with any statutory interpretation, we begin with the plain language of the statute. The State properly observes that, under the terms of the Code, the restitution obligation is not considered a "claim" or "debt" unless that obligation creates a right to payment. Under Pennsylvania's restitution statute, where a person is convicted for stealing, converting, or otherwise unlawfully obtaining property, the court is authorized to order restitution in addition to any other punishment properly prescribed for the

crime. 18 Pa.C.S.A. § 1106(a) (Purdon 1983). The statute, which specifically defines restitution as "[t]he return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court," limits the amount of restitution to "the return of the actual property or its undisputed dollar amount." 18 Pa.C.S.A. §§ 1106(d), 1106(h). If the victim receives any civil award, that award must be reduced by the amount paid under the criminal judgment. 18 Pa.C.S.A. § 1106(g). However, unlike a civil award, restitution payments are made directly to the probation department, not to the victim, and the Department then forwards those payments to the victim. 18 Pa.C.S.A. § 1106(e). Furthermore, the restitution statute grants the probation department sole

authority to institute judicial proceedings for the enforcement of the restitution order. 18 Pa.C.S.A. §§ 1106(f).

The State contends that the enforcement provision, which denies the victim any authority to enforce the criminal order, compels the conclusion that the victim has no right to payment of the restitution order and that the order does not, therefore, create a debt. Although, as mentioned, this argument has found favor in many bankruptcy courts, see supra at 9, and also in the Superior Court of Pennsylvania where in Commonwealth v. Mourar, 349 Pa. Super 8583, 504 A.2d 197, 208 (Pa. Super. 1986), vacated and remanded for further proceedings, 517 Pa. 83, 534 A.2d 1050 (1987), the court held that an order of restitution does not create a debtor-creditor relationship between the

offender and victim, we are unable to agree that this rationalization may be applied to the Bankruptcy Code.

As noted, Congress intended the concept of "claim," and, by association, the concept of "debt," to be given the "broadest possible definition." "Where the language of the statute is clear, 'only the most extraordinary showing of contrary intentions' justify altering the plain meaning of a statute." Malloy v. Eichler, 860 F.2d 1179, 1183 (3d Cir. 1988) (quoting Garcia v. United States, 469 U.S. 70, 75 (1984)). By focusing solely on the offender-victim relationship, however, both the DPW and the courts above unduly restrict those definitions. Even the Superior Court in

Commonwealth v. Mourar, supra, recognized that although "the victim cannot enforce the order of restitution . . . he could execute upon a civil judgment." Id. at 208. The only limitation imposed by the language of the Bankruptcy Code is that the obligation must give rise to a "right to payment." There is no requirement that that right be enforceable by any particular person or entity. Nor does the statute mandate such a restriction.

As the Court of Appeals for the Second Circuit noted under similar facts, the language of section 101(4) and the legislative history of the Code indicate that "Congress intended 'claim' to encompass any right held by any person or entity to enforce any money obligation of the debtor." To hold otherwise would "produce the anomalous

result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distribution of the debtor's assets in liquidation. In re Robinson, 776 F.2d at 35-36. That court ultimately concluded that "any right to the payment of restitution is a claim within the meaning of the Code; and that if any person or entity has a right to receive a payment of restitution from the bankruptcy debtor, the obligor has a debt within the meaning of the Code." Id. at 36; see also Kelly, 479 U.S. at 58 (dissent); In re Heincy, 78 B.R. 246, 248-49 (Bankr. 9th Cir. 1987)(restitution obligation constitutes debt within meaning of Code), rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); In re Cancel, 85 B.R. 677, 678 (Bankr. N.D.N.Y. 1988) (same); In re Cullens, 77

B.R. 825, 828 (Bankr. D. Colo. 1987) (same); In re Brown, 39 B.R. 820, 822 (Bankr. M.D. Tenn. 1984) (same).

We find the reasoning of the Court of Appeals in In re Robinson, supra, persuasive and conclude that the restitution obligation constitutes a debt so long as any person or entity has a right to enforce that obligation. Here, regardless of whether the victim, the DPW, may enforce the order of restitution, there is no question that the Probation Department may enforce the obligation through the institution of violation of probation proceedings. 18 Pa.C.S.A. § 1106(f). Certainly there can be no greater enforcement mechanism than the threat of revocation of probation and the imposition of incarceration. See In re Robinson, 776

F.2d at 38. Moreover, as the court observed in In re Robinson, 776 F.2d at 35-36, the interpretation suggested by the State would lead to the incredible result that an order of restitution in a state criminal proceeding would preclude the victim's participation in the bankruptcy proceeding or recovery of any distribution under the debtor's plan of arrangement. We conclude, therefore, that because the debtors here have incurred a very real obligation to which the Probation Department holds a right to payment within the meaning of section 101(4) of the Code that obligation constitutes a "debt" under the Code.

Although the Supreme Court in reviewing the Court of Appeals' decision in In re Robinson expressed doubt as to whether the restitution obligation is a debt, that doubt is founded upon factors

other than the plain language of the statute. See Kelly, 479 U.S. at 43-44. Specifically, the concerns of the Court, which we will address more fully with respect to the issue of discharge-ability, are based upon "the history of bankruptcy court deference to criminal judgments" and "the interests of the States in unfettered administration of their criminal justice systems." Id. We believe, however, particularly in light of the Court's conclusion in Kelly, that neither of these concerns alters the conclusion that a restitution obligation is a debt.

In Kelly, the Supreme Court held, without deciding the debt issue, that a restitution obligation is not dischargeable under Chapter 7 because that chapter specifically protects from discharge "any debt"

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.

479 U.S. at 53 (quoting 11 U.S.C.A. § 523(a)(7)). The Court determined that this provision was plainly intended to codify the judicially created rule that criminal penalties are not dischargeable. As the Court stated, "Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines." Id. at 51. Finding that restitution focuses primarily on rehabilitation and punishment, rather than upon compensation for the actual loss of the victim, the Court concluded that Congress excepted restitution obligations from discharge under Chapter 7 by virtue of section 523(a)(7).

Addressing the issue left unanswered by the Court, Justice Marshall, in dissenting, further illuminated the Court's analysis of the dischargeability issue, when he stated that it compels the conclusion that restitution is a debt. Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that if restitution orders and other criminal penalties were not debts, there would be no need to except them from discharge under Chapter 7. Kelly, 479 U.S. at 58. We find this reasoning persuasive and conclude that Congress must have recognized that such obligations were debts within the meaning of the Code. See Kelly, 479 U.S. at 58 (dissent); In re Heincy, 78 B.R. at 248; In re Cullens, 77 B.R. at 828.

The Court's analysis in Kelly also provides an apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when

the state's primary objectives in imposing such obligations are to rehabilitate and to punish the offender, rather than to compensate the victim.

The conclusion that criminal restitution constitutes a debt under the Code is consistent not only with the statutory scheme, but also comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7.[3]

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[3]The dissent relies on the dicta in Kelly to reach a contrary conclusion because the majority has not referred to any specific legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt." The dissent's approach, however, elevates the legislative history of a statute, or its absence thereof, over the plain language of that statute. It is well-

(FOOTNOTE CONTINUED ON NEXT PAGE)

House Rep. at 227, reprinted in 1978 U.S. Code Cong. & Admin. News at 6077. If restitution obligations were not part of the Chapter 13 plan, payments in restitution conceivably could deplete all the debtor's resources before any

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(FOOTNOTE CONTINUED)

established that "[i]f the language is clear and unambiguous, and there is no 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" National Freight, Inc. v. Larson, 760 F.2d 499, 503 (3d Cir.), cert. denied, 474 U.S. 902 (1985) (quoting Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Here, the broad, inclusive language of the statute is clear. To exclude restitution orders from the definition of "debt" would create an exception that Congress did not intend.

Moreover, as we have noted above, the scheme under the new Bankruptcy Code is plainly consistent with the conclusion that criminal restitution is a debt for purposes of Chapter 13 and carries out the congressional intent of encouraging debtors to opt for arrangements under Chapter 13 rather than liquidation under Chapter 7.

distribution is made to the other creditors. As a result, creditors would be more reluctant to confirm such a plan, making the Chapter 13 option entirely unavailable to some debtors. Such a result is contrary to Congress' objective of expanding the availability of the Chapter 13 option. Therefore, both the language of the statute and the intent of Congress support the conclusion that the criminal restitution obligation is a debt under the Code.

In response to the conclusion that criminal restitution is a debt, the State also relies on the legislative history of the Code, focusing on Congress' statement that "[t]he bankruptcy laws are not a haven for criminal offenders." Senate Rep. at 51, reprinted in 1978 U.S. Code Cong. & Admin. News at 5837; House Rep. at 342,

reprinted in U.S. Code Cong. & Admin. News at 6299. Although many courts have attached significance to this statement as support for the conclusion that restitution obligations are not debts, see, e.g., In re Pelligrino, 42 B.R. at 234; In re Johnson, 32 B.R. at 616, we find this argument unpersuasive. As an initial matter, we note that Congress intended the comment as an explanation for the "criminal proceedings" exception to section 362 which otherwise automatically stays all actions pending disposition by the bankruptcy court. 11 U.S.C.A. § 362. Nowhere in the discussion of either claim or debt, however, does Congress express a similar intention to restrict those definitions to exclude obligations arising from criminal penalties.

Moreover, the lack of such restrictions respecting the definitions of "claim" or "debt" is not remarkable. As discussed, Congress intended those concepts to be accorded broad and sweeping definitions. The language of the statute reflects that intention, employing inclusive, rather than exclusive, language. On the other hand, Congress elsewhere restricted application of the Code to exclude obligations arising from criminal penalties. Most notable of these exceptions is the exception to discharge for penalties and fines as provided in section 523, discussed infra at Part B. Therefore, because Congress has effectuated its policy of preventing the Code from becoming a "haven for criminals" by adopting appropriately restrictive language for specific provisions of the Code, such as sections

362(b) and 523(a), its silence on this subject with respect to other provisions is equally telling and may not be discounted. See In re Robinson, 776 F.2d at 37-38; In re Heincy, 78 B.R. at 248. We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting criminal penalties from the definitions of "claim" or "debt."

Having concluded that restitution obligations are debts within the meaning of the Code, we turn now to the issue of whether such debts are excepted from discharge under Chapter 13.

B.

Upon completion of payments under the repayment plan, Chapter 13 requires the court to discharge all debts provided for in the plan with only

two exceptions. Neither of the exceptions, however, pertains to penalties such as criminal restitution.[4] Because the plain language of the chapter does not except from discharge debts for

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[4]Specifically, Chapter 13 provides in pertinent part:

> As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt --
>
> (1) provided for under section 1322(a)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title.

11 U.S.C.A. § 1328(a) (1978).

The two exceptions include debts pertaining to alimony and child support, 11 U.S.C.A. § 523(a)(5), and debts cured after default, 11 U.S.C.A. § 1322(b)(5).

criminal restitution, we conclude that such debts are dischargeable under Chapter 13.

The statutory provisions for the discharge of debts and exceptions thereto under Chapter 7 also supports the conclusion that restitution debts are dischargeable under Chapter 13. Unlike Chapter 13, Chapter 7 excepts ten categories of debt from discharge as set forth in section 523(a), including, as discussed, section 523(a)(7) which excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit. . ." As the Court determined in Kelly, criminal restitution obligations fall within the category of "a fine, penalty, or forfeiture" under section 523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions

under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof. See supra note 3. Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the criminal penalties provision or any similar exception compels the conclusion that such penalties, including criminal restitution, are dischargeable under Chapter 13. Cf Kelly, 479 U.S. at 50.

We are mindful of the Court's admonition that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a

court considering equitable types of relief." Kelly, 479 U.S. at 49. However, where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone. Excepting criminal restitution from discharge, accordingly, is a matter for the Congress, not for the courts. Here, Congress has codified the criminal penalties exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy. Regardless of the potential effect on state criminal proceedings, therefore, we are constrained to conclude that the criminal restitution debt is dischargeable under Chapter 13.

We are equally mindful that Congress revised the Code in 1978 against a background of the judicial exception to the discharge of criminal penalties. If Congress had merely amended the Code in 1978 without either adopting or rejecting that exception, we would assume that Congress had acquiesced to its continued application. However, Congress did more than merely legislate against a background of an existing judicial exception; it codified the judicial exception and selectively incorporated it into the amended Code. Although Congress applied the codified exception to discharge under Chapter 7, it opted not to apply it to discharge under Chapter 13. Assuming that Congress desired to limit the application of that longstanding judicial exception, we are aware of no better method for Congress

to achieve that goal other than to codify the rule and to apply, or to omit to apply, that rule to the various chapters of the Code, as it has done. Where, as here, Congress has codified a judicial exception and only incorporated it into specific provisions of a statute, we believe it would be error for this court to inject that exception into the other provisions of the statute. We conclude, therefore, that Congress intended to vary the application of the criminal penalties exception under the Code, and did not intend to except such penalties from discharge under Chapter 13.

IV.

Accordingly, the judgment of the district court as to appellants Johnson-Allen and Steffler will be reversed and their cases remanded to the

district with directions to dismiss their appeals without prejudice because their claims were not ripe for resolution. The judgment of the district court with respect to the claims of the Davenports will be reversed and their case remanded to the district court with directions to affirm the order of the bankruptcy court.

Costs in the appeals of Johnson-Allen and Steffler will be taxed to each of them separately. With respect to the Davenports, costs will be taxed to the DPW, the appellee.

HUTCHINSON, Circuit Judge, dissenting.

The majority today holds that criminal restitution orders are "debts" within the meaning of §101(4) of the Bankruptcy Code and that they are dischargeable under Chapter 13 of the

Code. If the only basis for leaving criminal restitution orders undisturbed in bankruptcy were their non-dischargeability, I would agree with the majority that the textual differences between the Chapter 7 and 13 discharge sections would logically make these orders dischargeable in Chapter 13 proceedings. My disagreement with the majority lies in the threshold determination of whether such orders are debts. I am not persuaded by the majority's analysis on this point in the face of the strong dicta in Kelly v. Robinson, 107 S.Ct. 353 (1986), where the Supreme Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Code. Id. at 361. I believe that the concerns which prompted

the Supreme Court's reservations require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy. Accordingly, I respectfully dissent.[1]

In Kelly, the Supreme Court held that § 523(a)(7) of the Code preserves criminal restitution orders from discharge in Chapter 7 proceedings. Although it declined to decide whether such orders are debts under the Code, the Kelly Court voiced grave doubts as to whether they are debts before even

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[1]I agree with the Court that only the Davenports' appeal is ripe for disposition. See Majority Opinion, supra, at 423-424.

turning to the construction of § 523(a)(7). In doing so, it strongly suggested that the longstanding judicially created exception to bankruptcy court jurisdiction over criminal restitution orders was not altered by the Bankruptcy Code of 1978. This suggestion is strengthened by the Supreme Court's related observation that while "debt" is broadly drafted, "nothing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." Id. at 361 n.12.

The Kelly Court considered two factors in construing § 523(a)(7). They also underlie its comments on the debt issue. It first observed that the Code must be interpreted "in light of the history of bankruptcy court deference to

criminal judgments." Id. at 358. While the most natural construction of the predecessor statute, the Bankruptcy Act of 1898, would have allowed the discharge of criminal penalties, "most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." Id. These courts reasoned that the bankruptcy laws affected only civil liabilities and not punishment for the violation of criminal laws, a rationale which was specifically applied to restitution orders imposed as part of criminal sentences. Id. at 359 & n.6. "Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity." Id. at 359.

The Supreme Court then noted that "interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." Id. at 360. If criminal restitution orders were dischargeable, judgments imposed by state criminal judges would be subject to remission. The prospect of this, the Kelly Court reasoned, would impinge on the ability of state court judges to fashion the most appropriate sentences for violations of state criminal laws. Id. Observing that Congress would not lightly limit the options available to state court criminal judges, id. at 360-61, the Kelly Court concluded that "the States' interest in administering their criminal justice systems free from

federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." Id. at 361.[2]

It was "[i]n light of the established state of the law -- that bankruptcy courts could not discharge criminal judgments" that the Supreme Court said, "we have serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." Id. at 361. Despite this statement and the longstanding policy against granting bankruptcy courts jurisdiction over criminal restitution orders, the majority finds that Congress must have

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[2]The inclusion of restitution orders in the term "debt" would also seem to affect sentencing in United States District Courts.

meant to include them within the definition of "debt." It finds persuasive the dissent in Kelly which reasoned that unless such orders are debts there would be no need to except them from discharge under § 523(a)(7). Majority Opinion, supra, at 427; Kelly, 107 S.Ct. at 365 (Marshall, J., dissenting).

Just as the majority concedes that most courts have concluded that criminal restitution orders are not "debts" under the Code, Majority Opinion, supra, at 424, I would, absent Kelly and the historical context to which the Supreme Court referred, have to concede logical force to the argument that if they are not debts, there is no need to deny them discharge under §523(a)(7). The Kelly Court, however, was surely aware of this argument. Its

grave doubts as to whether criminal penalties are debts in the face of the dissent's reasoning indicates to me that restitution orders imposed as part of criminal sentences are not debts, despite the language of § 523(a)(7).

The Supreme Court has not yet decided whether criminal restitution orders are included in the term "debt." However, it has distinguished them from other obligations, saying "'[u]nlike an obligation which arises out of a contractual, statutory or common law duty, [a criminal restitution order] is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.'" Id. at 362 (quoting In re

Pellegrino, 42 B.R. 129, 133 (Conn. 1984)).

The interpretation advocated by the debtors, and accepted by the majority, would intrude on the states' ability to choose the most efficacious means of furthering their penal interests. The interpretation is "in clear conflict with state . . . laws of great importance." United States v. Ron Pair Enterprises, Inc., ___U.S.___, ___, 109 S.Ct. 1026, 1033, ___ L.Ed.2d ___ (1989). We are not referred to any specific legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt."[3]

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[3]The majority concludes that the statutory term "debt" is plain and unambiguous. I believe the dicta in

(FOOTNOTE CONTINUED)

In the absence of such specific legislative history, I believe the dicta in Kelly apply. "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and

(FOOTNOTE CONTINUED)

Kelly imply otherwise. Accordingly, I believe this is "an appropriate case" to consider the absence of legislative history. See Ron Pair Enterprises, Inc., ___, U.S. at ___, 109 S.Ct. at 1032 (where the statutory language is open to interpretation and the proposed interpretation conflicts with important state laws, "a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code" (emphasis added)); cf. Id. at 4261-62 (O'Connor, J., dissenting) (even where language of the Code is not open to interpretation, a court will look to legislative history before concluding that established pre-Code practice has been changed; "[t]he rule . . . is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change.").

debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" Kelly, 107 S.Ct. at 361-62 (quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)); see also id. at 359 ("if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific") (quoting Midlantic Nat'l. Bank v. New Jersey Dep't. of Environmental Protection, 474 U.S. 494, 501, 106 S.Ct. 755, 760 (1986)).[4]

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[4]The majority disposes of the impact its decision will have on the states' administration of their criminal justice systems by stating that "where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

this court to cure any perceived 'defects' in that legislation." Majority Opinion, supra, at 428 (emphasis added). I think it is beyond argument that today's decision will affect the sentencing discretion of state court judges. See Kelly, 106 S.Ct. at 360 (prospect of federal remission of judgments in some cases "would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems" (emphasis added)).

The difference between our approaches is also highlighted by the point at which these federalism concerns enter our respective analyses. The majority concludes that criminal restitution orders are debts and only addresses the impact on state criminal proceedings in discussing discharge-ability. In contrast, I would consider this impact both in determining whether criminal restitution orders are debts and whether they are dischargeable. The same is true of our respective treatment of the judicial exception to discharge of criminal penalties. Although this exception rests in part on the theory that orders imposed as part of a criminal sentence do not create a debtor-creditor relationship, see Kelly,

The judicially created exception "reflect[s] policy considerations of great longevity and importance." Ron Pair Enterprises, Inc., ___ U.S. ___, 109 S.Ct. at 1032. The majority opinion notes that the literal terms of the Code may support the discharge of criminal judgments, but that was also true under the Bankruptcy Act of 1898. The Supreme Court has indicated to me that the policy considerations and history transcend the logic

(FOOTNOTE CONTINUED)

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107 S.Ct. at 358-59 & n.6, the majority addresses it only after concluding that Congress intended to make such orders debts. By considering federalism concerns at each step, my approach is more likely to avoid construing the Code in a manner which impinges on the states' important interest in the unfettered administration of their criminal justice systems.

of a textual analysis. Accordingly, given this history, the complexity of the Code, the opinion of the Supreme Court in Kelly and the absence of legislative history evincing Congress's desire to alter pre-Code practice, I cannot conclude that Congress intended such a far reaching intrusion on the states' administration of their criminal justice systems as the majority's result entails.[5]

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[5]The majority finds support for its construction of "debt" in the fact that the discharge provisions of Chapter 13 are much broader than those of Chapter 7. It reasons that if criminal restitution orders are not debts, restitution payments may deplete a debtor's resources before distribution to other creditors. This, it is said, would make other creditors less likely to confirm a Chapter 13 plan and would therefore be "contrary to Congress' objective of expanding the availability of the Chapter 13 option." Majority Opinion, supra, at 427.

(FOOTNOTE CONTINUED)

I would affirm the order of the district court holding that the Davenports' criminal restitution obligation was not affected by the discharge.

(FOOTNOTE CONTINUED)

Only debts are subject to discharge. The fact that Chapter 13 contains a very broad discharge for obligations which are debts does not necessarily mean that criminal restitution orders should be considered debts. The question is not whether Congress intended to broaden the availability of the Chapter 13 remedy, but how great it intended this expansion to be. I believe the Supreme Court teaches us that if Congress had intended to remove the power to finally define the extent to which a person convicted of crime should make restitution from the criminal courts and place it in the bankruptcy courts -- by relegating his criminal restitution orders to the same status as his other obligations -- it would have spoken more clearly.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD & DEBORA DAVENPORT	:	CIVIL ACTION
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, COURT OF COMMON PLEAS OF BUCKS COUNTY AND EDWARD SPARKMAN, TURSTEE	:	Bankruptcy No. 87-2395F Adversary No. 87-0737F No. 88-3177

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JULY 29, 1988

Before the court is an appeal from a Bankruptcy Court Order discharging certain criminal restitution payments due from appellees Edward and Debora Davenport by Order of the Court of Common Pleas of Bucks County, Pennsylvania.

On September 17, 1986, the Davenports both entered pleas of guilty to welfare fraud in the Court of Common

Pleas of Bucks County. They were each sentenced to one year probation and ordered to pay $208.00 per month in restitution to the Bucks County Adult Probation and Parole Department ("Probation Department") until a total of $4,144,80 was repaid. Upon receipt of restitution payments, the Probation Department was to forward the payments to the victim of the crime, Pennsylvania Department of Public Welfare ("DPW"), who would share repayments with the federal government in accordance with 62 P.S. § 474. However, the Davenports never made any restitution payments.

On May 13, 1987, the Davenports filed a joint petition under Chapter 13 of the Bankruptcy Code. They listed the restitution obligation as an unsecured amount owed to the DPW.

On July 2, 1987, the Probation Department notified the Davenports that a pre-violation hearing would be held August 6, 1987. On July 20, 1987, counsel for the Davenports informed the Probation Department of the bankruptcy filing and requested that the parole violation charges be withdrawn. The Probation Department refused and held a pre-violation hearing on August 6, 1987, at which Mrs. Davenport appeared with counsel.

On August 12, 1987, the Davenports filed an adversary complaint in Bankruptcy Court to determine if their criminal restitution obligations were dischargeable. On October 20, 1987, the Bankruptcy Court confirmed the Davenports' Chapter 13 plan; the plan provided for payment of the restitution

obligations imposed by the Bucks County Court of Common Pleas. On October 26, 1987, the Bankruptcy Court held a hearing on the adversary complaint. On October 29, 1987, the Bucks County Court of Common Pleas held a violation of probation hearing. The violation charge was dismissed, but the Davenports were ordered to pay full restitution within three years. In an opinion dated March 8, 1988, the Bankruptcy Court determined that the restitution payments ordered by a state court as part of a criminal sentence were dischargeable in a Chapter 13 proceeding and that all restitution obligations imposed by the Bucks County Court of Common Pleas would be discharged by compliance with the Chapter 13 plan approved by the Bankruptcy Court. This appeal followed.

In accordance with the United States Supreme Court's opinion in Kelly v. Robinson, 479 U.S. ____, 107 S. Ct. _____, 93 L.Ed.2d 216 (1986), L.Ed.2d 216 (1986), and as stated in the well-reasoned opinion of Judge Gawthrop in Commonwealth v. Johnson-Allen. No. 87-1032, slip op. (E.D. Pa. July 14, 1988), the court holds that the Bankruptcy Code does not authorize discharge of state-imposed criminal restitution in a Chapter 13 bankruptcy.

Allowing a federal bankruptcy court to discharge a financial obligation imposed by a state court as an alternative punishment for crime would conflict with important policies of federalism. See Younger v. Harris, 401 U.S. 37 (1971). The decision to impose a particular punishment involves

a weighing of various goals of the state criminal justice system. See Kelly, 93 L.Ed.2d at 228. Sometimes the particular punishment (e.g. restitution payments to the victim of the crime) will have a concomitant private benefit for the victim of crime. Despite this private benefit, criminal restitution benefits, unlike civil obligations, involve vindication of fundamental public interests. See Id. at 227 ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.").

Although criminal restitution payments made to the court as ordered may be forwarded to the DPW or other victim of crime, the amount of payments is ordered by the court and is discretionary with the court in light of the circumstances. In Pennsylvania, no

victim has the right to recover restitution directly through the criminal process, whatever the entitlement to civil recovery. If criminal restitution payments eventually inure to the victim, the restitution is an incidental private benefit received in the implementation of public goals of punishment, deterrence and rehabilitation.

If a criminal restitution obligation can be discharged by filing a Chapter 13 petition, courts would be reluctant to impose restitution as a criminal penalty and might opt for periods of incarceration instead. It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact. Congress

did not state any express intention to the contrary. Whatever the rationale and merit of the views of the Bankruptcy Court as cogently analyzed by Judge Fox, we do not write on a clean slate. In view of the direction given by the Supreme Court in Kelly v. Robinson, 479 U.S. _____, 107 S. Ct. _____, 93 L.Ed.2d 216 (1986), until Congress acts or reacts, this court must reverse.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD & DEBORA DAVENPORT	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, COURT OF COMMON PLEAS OF BUCKS COUNTY and EDWARD SPARKMAN, TRUSTEE	:	Bankruptcy No. 87-2395F Adversary No. 87-0737F No. 88-3177

ORDER

AND NOW, this 29th day of July, 1988, it is ORDERED that the Opinion of the Bankruptcy Court, dated March 8, 1988, is REVERSED for the reasons set forth in the foregoing Memorandum.

_____ J.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR. a/k/a EDWARD DAVENPORT and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy No. 87-02395F
EDWARD & DEBORA DAVENPORT	:	
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and COURT OF COMMON PLEAS OF BUCKS COUNTY, ADULT PROBATION AND PAROLE DEPT. and EDWARD SPARKMAN, TRUSTEE	:	
Defendants	:	Adversary No. 87-0737F

O P I N I O N

By BRUCE FOX, Bankruptcy Judge:

The narrow issue before me is whether a criminal restitution obligation may be discharged in a Chapter

13 case. The debtors have commenced an adversary proceeding seeking a determination that an order of criminal restitution requiring them to make payments to the Bucks County Adult Probation and Parole Department represents a dischargeable unsecured debt which is provided for by their confirmed chapter 13 plan and which is made dischargeable by virtue of 11 U.S.C. §1328. Both the Probation and Parole Department as well as the Commonwealth of Pennsylvania, Department of Public Welfare, (DPW) to whom the restitution payments would ultimately be sent, vigorously oppose the dischargeability of this obligation.

I.

The underlying facts are not seriously controverted.

On September 17, 1986, both debtors entered guilty pleas to the crime of welfare fraud in state court in Bucks County, Pennsylvania. Each was sentenced to one year probation; each was ordered to make criminal restitution payments of $208.00 per month beginning in December, 1986, until a total of $2,072.40 was repaid by the debtors. Payments were to be completed by September, 1987, and were to be sent to the Probation and Parole Department which was then to forward them to DPW.

On May 15, 1987, the debtors filed a voluntary petition in bankruptcy under chapter 13. The criminal restitution obligation was listed as an unsecured debt payable to DPW which was

to be paid as other unsecured debts are paid. When the debtors failed to make restitution payments as required by state court order, the Probation and Parole Department commenced violation hearings on July 2, 1987. An informal hearing was scheduled before the Department on August 6, 1987. On July 20, 1987, debtors, through their bankruptcy counsel, informed the Department of the pendency of their bankruptcy case and requested that the Department consider withdrawing the parole violation charges. When the Department decided to press the violation issue, this adversary proceeding was initiated on August 12, 1987. On October 20, 1987, the debtors' chapter 13 plan was confirmed without objection from any creditors and with

the express approval of the standing chapter 13 trustee. See In re Hines, 723 F.2d 333 (3d Cir. 1983).

This proceeding was heard by this court prior to a hearing scheduled in state court for October 29, 1987, on the question of probation violation. While the Department was willing to request that the violation hearing be postponed, pending the outcome of this hearing, ultimately the debtors decided to proceed in state court. The parties informed me that state court insisted and the debtors agreed to make restitution payments;[1] however, the debtors

[1]A new order was entered granting the debtors three years to make restitution payments.

are also continuing to press their dischargeability complaint.[2] See In re Johnson-Allen, 69 B.R. 461, 463 (Bankr. E.D. Pa. 1987) appeal pending (debtor resumed making restitution payments pending disposition of dischargeability complaint).

II.

The fact that the debtors' chapter 13 plan has already been confirmed provides a framework for the

[2]The debtors sought to introduce evidence that they never agreed to make restitution in September 1986. The defendants sought to introduce evidence that the debtors could afford restitution payments. The former is more properly addressed to state court. The latter is barred by the entry of the confirmation order. If the defendants believe that all of the debtors disposable income was not to be paid under their plan, this should have been raised prior to confirmation. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1226 (8th Cir. 1987); In re Fries, 68 B.R. 674 (Bankr. E.D. Pa. 1986).

dispute before me. 11 U.S.C. §1327(a) states that:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Thus, the debtor's plan, which provides for the payment of their criminal restitution obligation, is now binding upon their creditors. See Matter of Gregory, 705 F.2d 1118 (9th Cir. 1983) (embezzlement debt). See also In re Bonanno, 78 B.R. 52 (Bankr. E.D. Pa. 1987); In re Stern, 70 B.R. 472 (Bankr. E.D. Pa. 1987). However, although the plan terms may be binding, 11 U.S.C. §1328(a) limits the chapter 13 discharge to, inter alia, "all debts provided for by the plan." Clearly, the criminal restitution obligation is "provided for"

by the debtors' plan. Matter of Gregory. The issue therefore becomes whether the criminal restitution order is a "debt" - a matter expressly left open by the Supreme Court in Kelly v. Robinson, ____U.S. ____, 107 S.Ct. 353 (1986). If so, upon completion of their plan payments, the debtors' obligation to make restitution must be discharged. See In re Cullens, 77 B.R. 825 (Bankr. D. Colo. 1987); In re Stern. If the obligation is not a "debt" within the meaning of the Bankruptcy Code, see e.g. In re Oslager, 46 B.R. 58 (Bankr. M.D. Pa. 1985), then the obligation is not discharged.[3]

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[3]This analysis differs from that adopted in In re Newton, 15 B.R. 708 (Bankr. N.D. Ga. 1981). The Newton court considered that the criminal restitution obligation was a debt, but it was nondischargeable nonetheless. Newton held that policy considerations required it to interpret §1328(a) beyond its stated exceptions.

With statutory interpretation one starts first with the language of the relevant statutory provisions. Kelly v Robinson, 107 S.Ct. at 358. A "debt" is defined as a "liability on a claim." 11 U.S.C. §101(11). A claim is defined as follows:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. §101(4).

This definition is much broader than existed under the former Bankruptcy Act of 1898. See Ohio v. Kovacs, 469

U.S. 274, 105 S.Ct. 905 (1985); In re Heincy, 78 B.R. 246 (Bankr. 9th Cir. 1987); In re Johnson-Allen, 69 B.R. 461, 467 (Bankr. E.D. Pa. 1987). In this circuit, the Court of Appeals has interpreted this definition with an eye toward its legislative history:

> Congress intended the definition of a claim to be very broad; the legislative history states:
>
> The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.... By this broadest possible definition, and by the use of the terms throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no

> matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

Matter of M. Frenville Co., Inc., 744 F.2d 332, 336 (3d Cir. 1984) cert. denied, 449 U.S. 1160 (1985) quoting H.R. Rep. No. 95-595, 95th Cong. 2d Sess. 309 (1978). Accord e.g., Ohio v. Kovacs; Remington Rand Corp. v. General Services Administration, 836 F.2d 825 (3d Cir. 1988). The existence of a claim, for bankruptcy purposes, arises when: (1) the claimant possesses a right to payment; and (2) the right to payment arose prepetition.[4] Remington Rand 836 F.2d at 830.

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[4]There is no dispute that both the debtor's conduct which gave rise to their prosecution and the restitution order occurred prepetition.

The criminal restitution obligation is derived from an order of the Bucks County Court of Common Pleas, entered pursuant to 18 P.S. §1106. This criminal statute defines restitution as "the return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court." The amount of restitution and manner of payment is left, within limits, to court discretion. If restitution is ordered, payment shall be made to the probation department which shall then forward the payments to the victim. While the victim is not divested of any right to seek a civil damage award, that award must be reduced by the restitution payments received. Finally, enforcement of the restitution order is by contempt proceeding. Id. See Commonwealth v. Wood, 300 Pa.Super. 463, 446 A.2d 948 (1982).

I agree with those courts that have concluded that restitution obligations fall within the broad definition of a "claim", recently enacted by Congress with the passage of the Bankruptcy Code. E.g In re Heincy; In re Hackney, 16 BCD 1357 (Bankr. N.D. Cal. 1988); In re Cullen, 77 B.R. 825 (Bankr. D. Colo. 1987); In re Taite, 76 B.R. 764 (Bankr. C.D. Cal. 1987); In re Johnson-Allen; In re Gilliam, 67 B.R. 83 (Bankr. M.D. Tenn. 1986); In re Brown, 39 B.R. 820 (Bankr. M.D. Tenn. 1984); In re Newton. Contra e.g., In re Oslager; In re Pellegrino, 42 B.R. 129 (Bankr. D. Conn. 1984); In re Button, 8 B.R. 692 (Bankr. W.D.N.Y. 1981). Both the Probation and Parole Department as well as DPW had the prepetition right to demand payment from the debtors. That the Department's right was enforceable

by contempt rather than by civil execution, or that it arose as a result of a criminal order rather than by a civil judgment does not make it any less of a right to payment:

> If the Bankruptcy Code said that only orders to pay money by civil courts are debts for bankruptcy purposes, then credence could be given to the defendant's argument that a criminal court restitution order does not embody a "debt" dischargeable in bankruptcy. However, nothing in the Bankruptcy Code suggests that only civil courts enter orders to pay money that are subject to discharge in bankruptcy. A restitution order by a criminal court no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment. The fact that a criminal court might participate in enforcement or collection of the debt between victim and debtor/defendant does not make the underlying obligation a "nondebt" for bankruptcy purposes.

In re Brown, 39 B.R. at 822. Accord e.g. In re Johnson-Allen. See also 5 Collier on Bankruptcy ¶1300.12[2] (15th Cir. 1987).

Indeed, this point is emphasized by the existence of 11 U.S.C. §523(a)(7). Since only "debts" are discharged in bankruptcy, fines, penalties and forfeitures made payable to governmental units must be debts; otherwise there would be no need to expressly make such obligations nondischargeable in chapter 7 and some chapter 11 cases. In re Cullens; In re Johnson-Allen. In likening criminal restitution obligations to fines and penalties, the Supreme Court in Kelly v. Robinson made it difficult to conclude that a governmental unit possesses no

right to payment. Thus, both the Department and DPW had a right to payment which arose prepetition. Both entities possessed a "claim" and held a "debt" within the meaning of the Bankruptcy Code. See Remington Rand.[5]

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[5]Although the Probation and Parole Department was not listed as a creditor, it had knowledge, as a defendant, of the debtors' bankruptcy filing and their intentions regarding their criminal restitution obligation. Without now deciding this issue, it is possible that service of this adversary proceeding constituted sufficient notice to bind the Department to the confirmed plan. See Reliable Electric Co. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984). See also 11 U.S.C. §523(a)(3). Here, the adversary complaint was served more than two months prior to confirmation. Of course, it is better practice to have scheduled the Department as a creditor. In re Johnson-Allen, 69 B.R. at 465.

III.

Although I conclude that restitution obligations are claims as defined by 11 U.S.C. §101(4), that conclusion does not completely end the analysis in this proceeding. In Kelly v. Robinson, 107 S.Ct. at 361, the Supreme Court stated:

> In light of the established state of the law - that bankruptcy courts would not discharge criminal judgments - we have serious doubts whether congress intended to make criminal penalties "debts" within the meaning of §101(4).

(footnote omitted).

These doubts arose because the Court, in reviewing decisions under the former Bankruptcy Act of 1898, concluded that criminal restitution obligations were not dischargeable. It is a rule of statutory construction that clear evidence should be found before a court

concludes that Congress intended to alter long-standing statutory interpretations. Midlantic National Bank of New Jersey Department of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755, 760 (1986). Accord e.g. In re Paolino, 75 B.R. 641, 649 (Bankr. E.D. Pa. 1987). Thus, the focus becomes one of Congressional intent regarding the scope of the chapter 13 bankruptcy discharge. When considering this question of intent, a bankruptcy court must also be mindful, not just of the prior policy concerning criminal restitution, but also, of federalism and comity concerns regarding federal court interference with state court criminal prosecutions, expressed in decisions such as Younger v. Harris, 401 U.S. 37 (1971).

A.

When Congress accepted the recommendation of the Bankruptcy Commission to revise former chapter XIII, it did so recognizing that chapter XIII had not been much utilized at least in some parts of the country. The Report of the Committee on the Judiciary, House of Representatives stated:

> In addition, an overly stringent and formalized chapter XIII (wage earner plans) has discouraged overextended debtors from attempting to arrange a repayment plan under which all creditors are repaid most, if not all, of their claims over an extended period. The hearings before the Sub-committee indicated strongly that most consumer debtors would rather work out a repayment plan than file straight bankruptcy. They opt

> for straight bankruptcy only because present chapter XIII simply cannot meet their needs. Only in certain areas of the country where the bankruptcy judges have taken an active interest, have put in the extra effort required to make chapter XIII work, and have encouraged the bar to recommend its use, has chapter XIII provided any substantial or realistic alternative to straight bankruptcy liquidation.

H.R.Rep. No. 95-595, 95th Cong. 1st Sess. at 117 (1977)(footnotes omitted). Congress, after reviewing the commission report and conducting hearings, determined that an attractive, flexible chapter 13 would benefit both creditors and debtors. Debtors would be able to avoid the effects (such as loss of nonexempt property) and stigma of liquidation while general unsecured creditors would be able to recover some repayment on outstanding debts:

The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

Id. at 118.

Various changes were engrafted into the new chapter 13 that make it an attractive alternative to chapter 7. For example, eligibility to become a debtor under chapter 13 was expanded: no

longer were only wage earners qualified to formulate reorganization plans. Reorganization procedures were made inexpensive. There was no cumbersome writing or disclosure requirements. As the House Report noted:

> This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out. First, the bill simplifies, expands, and makes more flexible wage earner plans, called plans for Individuals with Regular Income, under the bill. Second, many of the provisions in the current bankruptcy law that enable private action to undo the beneficial effects of bankruptcy are changed. Third, the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start. Fourth, the bankruptcy system is modified to eliminate the close relationship between a bankruptcy judge and a trustee that often works to the consumer debtor's detriment. The premises of the bill with respect to consumer bankruptcy

> are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13, Adjustment of debts of an Individual and Regular Income; and finally, whether the debtor uses chapter 7 liquidation, or chapter 13, Adjustment of Debts of an Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start.

Id. at 117-118. See also In re Bobroff, 766 F.2d 797, 803-804 (3d Cir. 1985); 5 Collier on Bankruptcy ¶1300.02 (15th ed. 1987); 3 Norton Bankruptcy Law and Practice, ¶66.07 (1981).

Another method chosen by Congress to make Chapter 13 reorganization plans attractive to individual creditors was to provide them with a broad discharge upon completion of their plan payments - broader than the discharge received in chapter 7. As the Commission Report made clear:

> If the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing to go along, he should be allowed to do so. The fact that a discharge would not be available in a liquidation case should furnish a greater incentive for the debtor to perform under the plan.

Report of the Commission on The Bankruptcy Laws of the United States, H. Doc. No. 93-137. 93d Cong. 1st Sess. Pt.I at 175 (1973). Therefore, 11 U.S.C. §1328(a) makes dischargeable debts that would not be dischargeable in chapter 7, such as debts involving fraud and embezzlement. See Matter of Gregory; In re Gilliam; 3 Norton Bankruptcy Law and Practice ¶78.01 (1979)[6] Even fines, penalties and forfeitures, made payable to governmental units, are made dischargeable in chapter 13.

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[6]Compare §1328(b), the hardship discharge, which is not broader than the chapter 7 discharge.

In determining whether Congress intended to make criminal restitution payments nondischargeable, I agree with the Ninth Circuit Bankruptcy Appellate Panel, that the examination of congressional intent is best achieved by considering the discharge provisions of chapter 13, rather than the definition of "claim" or "debt":

> If Congress desired, for policy reasons, to preclude a state criminal defendant in bankruptcy from nonpayment of an order of restitution, it is unlikely that it would do so by limiting the definition of "claim" and "debt". A more effective means to this end would be achieved by altering the dischargeability provisions under the Code.

In re Heincy, 78 B.R. at 248. See also In re Brown, 39 B.R. at 829. As discussed above, I am persuaded that Congress understood that the broad discharge of chapter 13 would make dischargeable debts which were historically nondischargeable under the

provisions of the Bankruptcy Act. This includes fines and penalties, as well as restitution obligations.

Recent amendments to the Bankruptcy Code have sought to insure that the purposes Congress envisioned when it modified chapter 13 from its precode form are achieved. Insofar as this dispute is concerned, the most significant amendment is 11 U.S.C. §1325(b):

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due

under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended -

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

By virtue of §1325(b), unsecured creditors can compel that all of the debtor's disposable income (as defined) will be distributed under a confirmed chapter 13 plan. See Education Assistance Corp. v. Zellner; In re Fries.

Were prepetition criminal restitution obligations not dischargeable, conflicts would exist between the debtor's obligation to utilize all of his

disposable income in plan payments and his obligation to make restitution. Under state law, 18 U.S.C. §1106, a court must consider the debtor's financial circumstances, as well as the injury suffered by the victim, when establishing the terms of restitution. The funds from which restitution is ordered would be considered disposable income under §1325(b). If restitution is not a debt governed by a chapter 13 plan, then either the debtor cannot comply with §1325(b), or the definition of disposable income must be adjusted. The former result would defeat the congressional goal of encouraging the use of chapter 13; the latter result would defeat the equality of treatment principle focused in 11 U.S.C. §1322(a)(3), for the prepetition victim would receive greater payments than other unsecured creditors.

As Judge Scholl noted in In re Johnson-Allen, Congress determined that the policies to be furthered both by the broad "fresh start" created by the chapter 13 discharge, along with equality of treatment to creditors who shall receive the debtor's disposable income were sufficient reasons to alter precode precedent. This determination is clear from the history surrounding the enactment and amendments to chapter 13.

B.

Most courts which have expressed difficulty with the notion that a criminal restitution order might be dischargeable, do so in terms quite similar to the following legislative statement which is part of the legislative history of 11 U.S.C. §362(b):

> The bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 342 (1977). See In re Newton, 15 B.R. at 710. Discharging a restitution obligation does not run counter to this legislative statement. 11 U.S.C. §362(b)(1) excepts from the operation of the automatic stay "the commencement or continuation of criminal actions against the debtor." The policy of not making the bankruptcy court a "haven" for criminals is preserved by insuring that those accused of a crime may be prosecuted even though they may file bankruptcy petitions. Moreover, federalism, and comity are respectd by

decisions such as Matter of Davis, 691 F.2d 176 (3rd Cir. 1982) which forbids a bankruptcy court from enjoining the criminal prosecution even though the debtor fears that restitution will be imposed. Unless the prosecution is brought in bad faith, no injunction may issue. Id. Accord Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982).

In forbidding the issuance of an injunction, the Third Circuit noted that the sentencing discretion provided to criminal courts might possibly be affected by provisions of the bankruptcy code. Matter of Davis, 691 F.2d at 178, 179, n.8. The Supreme Court feared that discharging restitution obligations would have such an undesirable result.

> This prospect [discharge] in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines,

> and restitution most likely to further the rehabilitative and deterent goals of state criminal practice systems.

Kelly v. Robinson, 107 S.Ct., at 360 (footnote omitted).

But as the Supreme Court noted, fines and penalties along with restitution are also among the sentencing options accorded to state criminal judges. Yet, there is no dispute that §1328(a) discharges criminal fines and penalties.[7] There is no expression in

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[7]This case does not present the complex question whether payment of a restitution obligation under a chapter 13 plan is grounds to revoke probation. See United States v. Caddell, 830 F. 2d 1008 (5th Cir. 1987) (chapter 11 debtor is not insulated from probation revocation hearing when he fails to comply with.restitution order); In re Gilliam (only the discharge injunction provided by §524 protects a chapter 13 debtor from a revocation hearing; (the bankruptcy court does not discuss §1327).

either the current statutory language or legislative history that Congress was more protective of restitution obligations than of criminal fines or penalties. Thus, I cannot conclude that comity or federalism concerns mandate that restitution obligations be nondischargeable.

IV.

To the extent that the chapter 13 discharge is too broad, this results from choices made by Congress. If this is a problem which needs to be addressed it is up to Congress, not this court to do so. See generally Tennessee Valley Authority v. Hill, 437 U.S. 153, 185, 98 S.Ct. 2279, 2297 (1978); Gennuso v. Commercial Bank and Trust Co., 566 F.2d 437, 443 (3d Cir. 1977)(misgivings about the scope of the consumer protection statute should be addressed to Congress not to the court). Indeed, Senate Bill, No. 548, 100th Cong. 1st Sess. would make, some, but not all,[8] restitution

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[8]The bill seems to make non-dischargeable only restitution obligations concerning violation of consumer protection statutes. See In re Cullens, 77 B.R. at 828; S.Rep. No. 246, 100th Cong., 1st Sess. at 8-9 (1987).

obligations nondischargeable in chapter 13. See S.Rep. No. 246, 100th Cong. 1st Sess., at 8-9 (1987). The bill was passed by the Senate on July 24, 1987 and is pending before the House. Until 11 U.S.C. §101(4) or, more likely, §1328(a) is amended, I have no choice but to apply their terms. Therefore, the debtors' criminal restitutional obligation is dischargeable upon completion of their plan payments. As any payments of the restitution obligation already made would constitute property of the estate, 11 U.S.C. §1306, any funds paid by the debtors to defendants shall be turned over to the standing chapter 13 trustee. In re Johnson-Allen.

An appropriate order will be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR. a/k/a EDWARD DAVENPORT and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy No. 87-02395F
EDWARD & DEBORA DAVENPORT	:	
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and COURT OF COMMON PLEAS OF BUCKS COUNTY, ADULT PROBATION AND PAROLE DEPT. and EDWARD SPARKMAN, TRUSTEE	:	
Defendants	:	Adversary No. 87- 0737F

O R D E R

AND NOW, this 8th day of March, 1988, upon consideration, it is hereby ORDERED that the obligation of the

debtors to make payments to the Bucks County Adult Probation and Parole Department for the purposes of restitution to the Commonwealth of Pennsylvania Department of Public Welfare represents a dischargeable, unsecured debt in this chapter 13 case. Any payments made by plaintiffs and received by defendants shall be turned over to the standing chapter 13 trustee.

/s/
BRUCE FOX
United States Bankruptcy Judge

EDWARD DAVENPORT
DEBORA DAVENPORT

Chapter 13
Bankruptcy No.
87-02395F
Adversary No.
87-0737F

Copies of the Bankruptcy Judge's Opinion and Order dated March 8, 1988, mailed on said date to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENTA OF PUBLIC WELFARE	:	FILED JULY 15, 1988
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

MEMORANDUM AND ORDER

GAWTHROP, J.

Pending before this court is an appeal from the Department of Public Welfare (DPW) from a bankruptcy court decision, involving two similar cases, which held that criminal restitution payments may be discharged in a Chapter

ENTERED: 7/15/88

CLERK OF COURT

13[1] case. Upon consideration of the statute, and its interpretation by the Supreme Court in Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), in which the Court construed it against the background of certain long-standing policies, I will reverse.

BACKGROUND

On January 17, 1984, and June 18, 1985, respectively, appellees, Ruby Steffler and Lorraine Johnson-Allen pled guilty to welfare fraud. Appellees were placed on probation and were ordered to

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[1] 11 U.S.C. §§ 1301-1330. This Chapter permits debtors to retain their assets, while applying a portion of future earnings towards their debts. See generally: In re Smith, 848 F.2d 813 (7th Cir. 1988); 3 W. Norton, Bankruptcy Law and Practice §§ 66.08 - 66.09 (1981).

make restitution payments to the DPW[2] pursuant to section 62 Pa.Stat.Ann. § 481 (Supp. 1988).

After they had begun making restitution payments, appellees filed voluntary petitions for relief under Chapter 13. On May 19, 1986, DPW filed separate complaints in the bankruptcy court against the appellees to determine

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[2]Before this case was reassigned to me, Judge Ditter issued an order requiring DPW to show cause why it had standing to challenge the dischargeability of the restitution payments, the record not being complete in this regard. In the accompanying memorandum, Judge Ditter noted that "in the cases cited by the parties, the challenge to the discharge of the restitution payments was brought by the state agency that received the payments directly from the offender. Commonwealth of Pennsylvania v. Johnson-Allen, 81 B.R. 295, 296 (E.D. Pa. 1987). Since appellees made their restitution payments directly to DPW, it is now clear that DPW has standing in this matter.

the dischargeability of their debt. These complaints alleged, essentially, that the restitution payments were not "debts" within the meaning of the Bankruptcy Code (Code), and, hence, non-dischargeable. Appellee filed answers and counterclaims against the agency, contesting the legal bases for DPW's assertions, and averring that the agency was in contempt of court for violating the automatic stay provisions of the Code. 11 U.S.C. §362. Cross-motions for summary judgment were then filed by the parties. The Honorable David A Scholl, United States Bankruptcy Judge, granted appellees' motions for summary judgment, but declined, however, to grant sanctions against DPW pursuant to 11 U.S.C. § 362(h). In re Johnson-Allen, 69 B.R. 461 (Bkrtcy. E.D. Pa. 1987).

DISCUSSION

The Code defines a "debt" as a "liability on a claim." 11 U.S.C. § 101(11). The term "claim" is defined by 11 U.S.C. § 101(4), which reads as follows:

> (4) "claim" means-
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

In interpreting these provisions and assessing the policies underlying them, I begin by considering

the effect of the Supreme Court's decision in Kelly v. Robinson, supra. There, one Carolyn Robinson had been convicted of larceny for wrongfully receiving public assistance benefits. A Connecticut state court sentenced her to a term of probation, conditioned on her making restitution payments to the State of Connecticut Office of Adult Probation (COAP). Three months later, Robinson filed a petition under Chapter 7 of the Code, 11 U.S.C. § 701-766, in which she listed COAP as a having a claim against her. COAP filed neither a complaint to determine dischargeability, nor an objection to discharge, and, consequently, on May 14, 1981, the Bankruptcy Court granted Robinson's petition. In February of 1984, COAP informed Robinson that it intended to enforce the restitution order. Robinson responded by instituting adversarial proceedings in

the bankruptcy court. Following a trial, the bankruptcy judge concluded that Robinson's obligation to pay restitution was unaffected by its order of May 14, 1981.

The Second Circuit reversed, holding that the restitution obligation constituted a "debt," dischargeable under the Code, and pointing to legislative history of the Code which they read to suggest that "in enacting § 101(4), Congress sought the 'broadest possible definition' of a claim, ...intending that virtually all obligations to pay money be amenable to treatment in bankruptcy proceedings..." In re Robinson, 776 F.2d 30, 35 (1985)(citation omitted), rev'd, sub nom., Kelly v. Robinson, supra. The Court of Appeals reasoned that "by giving 'claim' the broadest possible definition and defining 'debt' in terms

of a 'claim,' Congress also sought to give the term 'debt' its broadest possible scope." 776 F.2d at 36. It is this analysis that Judge Scholl approved in his very thorough opinion which is before me for review.[3]

It is this analysis, however, that the Supreme Court disapproved. Speaking through Justice Powell, the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of

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[3]In support of this viewpoint, Judge Scholl cites Ohio v. Kovacs, 469 U.S. 274, 278-80 (1985). That case, however, is factually and legally distinguishable from the case at bar. In Kovacs, the Supreme Court was faced with the issue of whether obligations under a civil court order, i.e. an injunction to clean up a hazardous waste site, fell within the Code's definition of a "debt." By contrast, the sole issue here is whether criminal restitution payments fall within the Code's purview.

§ 101(4)." 107 S.Ct. at 361., 93 L.Ed.2d at 229 (footnote omitted). The Court observed that Congress had enacted the Code in light of established judicial precedent, holding that bankruptcy provisions "have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." 107 S.Ct. 359, 93 L.Ed.2d at 226, quoting In re Moore, 111 F. 145, 150 (WD Ky. 1901). The Court found nothing in the language of the Code, nor in its legislative history, which showed that Congress intended to abrogate this judicial exception with respect to criminal judgments. 107 S.Ct. 359, 361, n.12, 93 L.Ed.2d at 229. In so stating, the Court underscored its

> deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." Younger v. Harris. 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971).

107 S. Ct. 358-360, 93 L.Ed.2d at 227.[4]

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[4]This sensitivity to the separate sovereign status of the Nation and its sundry States is well recognized in this circuit. In Matter of Davis, 691 F.2d 176, 179 (3d Cir. 1982), Judge Adams pertinently stated:

> [A] federal court must consider "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire Country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

(FOOTNOTE CONTINUED ON NEXT PAGE)

The Court further noted that, "apart from the burden on state officials of following and participating in bankruptcy proceedings, it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts." 107 S.Ct. at 360, n.8, 93 L.Ed.2d at 227-228, n. 8.

The Court refrained from deciding whether restitution payments constituted "debts" under the Code, holding, instead, that the restitution order was nondischargeable under Chapter

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(FOOTNOTE CONTINUED)

> States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. ... [37,] 44 [(1971)]. A federal court should be especially cautious in enjoining state criminal proceedings, because of the state's paramount interest in protecting its citizens through its police powers.

7, because it fell within the exception to discharge found in 11 U.S.C. § 523(a)(7). 107 S.Ct. 361-363, 93 L.Ed.2d 229-231. This section provides, in pertinent part:

> (a) A discharge under section 727...of this title does not discharge an individual debtor from any debt--
>
> * * * *
>
> (7) to the extent such debt is for fine, penalty, or forfeiture payable to and for the benefit of a governmental unit and is not compensation for actual pecuniary loss, other than a tax penalty;
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition....[5]

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[5]Judge Scholl viewed this ultimate subsection as providing support for an absence of Congressional intent to exclude all criminal penalties, stating:

(FOOTNOTE CONTINUED ON NEXT PAGE)

The foregoing exception to discharge does not apply to proceedings under Chapter 13. The applicable discharge provision for this chapter is 11 U.S.C. § 1328, which pertinently states:

> (a) As soon as practicable after completion by the debtor of all payments under the Plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title.

Although, as the dissent noted in Kelly v. Robinson,[6] the holding of the Supreme Court left open the question of whether criminal restitution payments are debts dischargeable in Chapter 13 proceedings, its rationale is no less compelling merely because it chose to address the matter in the context of Chapter 7.

The Supreme Court's reasoning is particularly persuasive in light of

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(FOOTNOTE CONTINUED)

"It is difficult to understand what purpose Congress would have served by exempting criminal penalties less than three (3) years old from discharge if it meant to exempt all such penalties from discharge." In re Johnson-Allen, 69 B.R. at 467. I must disagree with Judge Scholl's construction of this subsection, since it applies only in regard to tax penalties. In re Kohr, 82 B.R. 706, 710 (Bkrtcy. M.D. Pa. 1988); 1 W. Norton, Bankruptcy Law and Practice § 27.33 (1981).

[6] 107 S.Ct. at 366, n.6, 93 L.Ed.2d at 234, n.6 (Marshall, J. dissenting).

the pronouncement by the Pennsylvania Superior Court, affirmed sub silentio by the Pennsylvania Supreme Court, that "[a]n order of restitution does not establish a debtor-creditor relationship between the victim and the criminal." Com. v. Mourar, 349 Pa. Super. 583, 504 A.2d 197, 208 (1986), vacated on other grounds, ____Pa.____, 534 A.2d 1050 (1987). See also In re Kohr, 82 B.R. 706, 711 (Bkrtcy. M.D. Pa. 1988) (probationary restitution not debt). If no debtor-creditor relationship exists, it is axiomatic that restitution payments cannot be discharged in bankruptcy.

In so stating, I well recognize that the statutory scheme for Chapter 13 bankruptcies is substantially different from Chapter 7; and I am mindful of the argument vigorously propounded by counsel for the bankrupts --and embraced by Judge

Scholl-- that the different schematic context compels a different result. And I must say that I find a certain inherent logic in the statutory syllogism to be found in the analyses of the Code's words by the Second Circuit and by Judge Scholl.[7]

But in construing the statute, it is to the Supreme Court to which I must ultimately turn, and by which I am

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[7]I am also aware of Judge Scholl's concern that "if the debtor is already paying all of his disposable income into a plan, it is theoretically and practically impossible that he will have anything left over to pay towards restitution." In re Johnson-Allen, 69 B.R. at 469. As Judge Mahoney points out, however, this assumes that money for criminal restitution payments would constitute disposable income. I agree with his observation that criminal restitution payments would, instead, "constitute a necessary expense that would be first subtracted in determining the debtor's disposable income available to pay debts under the plan." In re Cancel, 82 B.R. 674, 677 (Bkrtcy. N.D.N.Y. 1988) reversed on other grounds, 85 B.R. 677 (N.D.N.Y. 1988).

ultimately bound. "The law is, by definition precisely what the majority [of the Supreme Court] thinks, taking all things into account, it ought to be." Morrison v. Olson, 56 U.S.L.W. 4835, 4857 (June 29, 1988)(Scalia, J. dissenting)(emphasis in original).[8] The Supreme Court has forcefully declared its disapproval of the notion that the Code's definition of "debts" encompasses punishment inflicted pro bono publico for crimes committed -- i.e. restitution. Any differences between Chapters 7 and 13 are outweighed

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[8]Although the Supreme Court's declaration, doubting whether the Code's definition of "debt" encompasses restitution payments, is, admittedly, obiter dictum, there are many significant cases in the history of the Court's jurisprudential history in which language of the Supreme Court, although unequivocally dictum, has become settled and accepted doctrine. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2.L.Ed. 60 (1803).

by the clear, strong pronouncements of policy by the Highest Court of our land. I can only conclude that the statute says what they say it says.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

O R D E R

AND NOW, this 14th day of July, 1988, the order of the Bankruptcy Court in the above-captioned cases is REVERSED.

BY THE COURT:

/s/
ROBERT S. GAWTHROP, III J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

MEMORANDUM AND ORDER

DITTER, J. November 3, 1987

The Pennsylvania Department of Welfare appeals from a bankruptcy decision in two cases granting summary judgment in favor of the debtors and holding that a criminal restitution obligation is a claim dischargeable in a Chapter 13 bankruptcy, 11 U.S.C. § 1301-

1330.[1] In re Johnson-Allen, 69 Bankr. 461 (Bankr. E.D. Pa. 1986). Before addressing the merits of the appeal, however, I will order the Department of Public Welfare to show cause why it has standing to challenge the dischargeability in bankruptcy of the restitution obligations.

While the record in this bankruptcy appeal is far from complete,[2] it appears that debtors pleaded guilty to

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[1]The bankruptcy judge also held that all post petition restitution payments by the debtors were involuntary payments that must be remitted to the trustee. 11 U.S.C. §§ 522(g)(a), 522(b).

[2]The motions for summary judgment were decided solely on the basis of the unsworn affidavits of the debtors and counsel for the Department of Public Welfare. Central to the dispute are the restitution orders which are not part of the bankruptcy record.

public welfare fraud, 62 Pa. Cons. Stat. Ann. §481(a), were placed on probation, and were ordered to pay restitution to the County Probation Department on behalf of the victim, the Department of Public Welfare. This order of restitution was presumably made under 11 Pa. Cons. Stat. Ann. §1106(e) (Supp. 1987). Pursuant to this section, however, the victim has no right to payment of the restitution and can not enforce the restitution order.[3] Id. at 1106(f) (offender may be held in contempt or for violation of probation for failing to make restitution). See Commonwealth v. Mourar, 349 Pa. Super. 583, 504 A.2d 197 (1986)(order of restitution does not

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[3]Under the Bankruptcy Act, a creditor is defined as an entity that has a claim against the debtor. 11 U.S.C. §101(9). A "claim" is defined as a "right to payment." 11 U.S.C. §101(4).

create a debtor-creditor relationship between the victim and the criminal; therefore, a victim must pursue a separate civil action to compel payment of his losses) appeal granted, 511 Pa. 618, 515 A.2d 898 (1986); In re Pellegrino, 42 Bankr. 129 (D. Conn. 1984)(in analyzing the debtor-creditor relationship, each arm of the state, i.e., victim and enforcement agency, must be considered a separate entity). Moreover, in the cases cited by the parties, the challenge to the discharge of the restitution obligation was brought by the state agency that received the payments directly from the offender. E.g., Kelly v. Robinson, ____ U.S. ___, 107 S.Ct. 353 (1986); In re Pellegrino, supra; In re Button, 8 Bankr. 692 (W.D. N.Y. 1982).

If the restitution was ordered pursuant to section 1106, the Department of Public Welfare has no right to enforce the restitution award. Nevertheless, because the record is far from clear, I will give appellant an opportunity to file a brief in response to this memorandum.[4]

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[4]The parties may also want to address the effect, if any, of the bill passed by the United States Senate which would amend 11 U.S.C. §523(a) and §1328(a)(2) to exclude from discharge any debt "that to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a governmental unit to recover restitution ...." S. 548, 100th Congress, 1st Session (1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

ORDER

AND NOW, this 3rd day of November, 1987, appellant Commonwealth of Pennsylvania, Department of Public Welfare is hereby ordered to show cause within 10 days in accordance with the accompanying memorandum why it is a creditor or is entitled to bring the underlying complaint to determine the dischargeability of debtor's criminal restitution obligations.

BY THE COURT:

/s/

J.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: LORRAINE JOHNSON-ALLEN	:	Chapter 13
Debtor	:	Bankruptcy No. 86-01239K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE	:	
Plaintiff	:	Adversary No. 86-0463K
v.	:	
LORRAINE JOHNSON-ALLEN	:	
Defendant	:	
In re: RUBY STEFFLER a/k/a INGRID J. STEFFLER	:	
Debtor	:	Bankruptcy No.86-00205K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
Plaintiff	:	
v.	:	
RUBY STEFFLER a/k/a INGRID J. STEFFLER	:	
Defendant	:	Adversary No. 86-0464K

O P I N I O N

BY: THE HONORABLE DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE

These consolidated adversarial proceedings present the issues of whether

the liability of a Chapter 13 debtor to pay criminal restitution constitutes a "claim" dischargeable in the Chapter 13 case; and, assuming that the restitution obligation is a dischargeable claim, what remedies are available to the debtor to prevent collection of future payments and to recover post-petition payments made. We hold that a criminal restitution obligation does constitute a dischargeable "claim" and that the appropriate remedy is to direct the recipient of the restitution to remit all post-petition sums collected to the Trustee and to prevent the recipient from retaining future restitution remittances, but not, unless such directives are ignored, to enjoin any state proceedings or parties or to declare the restitution recipient to be in contempt of court.

These adversarial proceedings were filed separately by the Plaintiff, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE (hereinafter referred to as "DPW"), against each of the Debtors, LORRAINE JOHNSON-ALLEN[1] and RUBY STEFFLER, a/k/a INGRID J. STEFFLER, on May 19, 1986. Each of the Complaints which are prepared in identical form, aver that the Debtors pleaded guilty to several counts of prepetition welfare fraud and were ordered to make restitution payments to the County Probation Department on behalf of DPW. The relief sought in each Complaint was a declaration that the respective Debtors' restitution obligations were non-dischargeable, on three (3) separate

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[1]Our review of the file indicates that this Debtor utilizes a hyphenated last name and we shall therefore correct the caption to so indicate.

grounds: (1) They were within the scope of 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), and/or (a)(7); (2) The "claim" of the DPW was not a "debt;" and (3) DPW "is immune from suit and this court is foreclosed from discharging" DPW's "claim" by the Eleventh Amendment to the federal Constitution.

STEFFLER filed an Answer and Counterclaims on July 18, 1986, and JOHNSON-ALLEN filed an Answer on June 30, 1986, and thereafter, on August 26, 1986, an Amended Answer and Counterclaims, the latter of which virtually identical to that filed by STEFFLER. In these pleadings, the Debtors averred that, since the filing of their Petitions on January 14, 1986, and March 14,1986, respectively, they had made payments on the restitution obligations and they therefore sought damages against DPW for

violation of the automatic stay imposed by 11 U.S.C. § 362 and sought to avoid the postpetition transfers to DPW per 11 U.S.C. §§ 549, 522(h), and 522(g)(1).

The matters were listed for trial before us on September 9, 1986, and were continued to October 9, 1986. Only Counsel for the Debtors appeared on the latter date, and indicated that they were not prepared to try the case that day, but believed that the matters raised exclusively legal issues which could be resolved on cross-motions for summary judgment.

We therefore entered an Order on October 14, 1986, consolidating the adversarial matters for all purposes; directing the Debtors to either prepare a Stipulation of Facts or a Motion for Summary Judgment and file same with a Brief on or before November 10, 1986;

and directing DPW to file any materials in response to the Debtors' filing on or before December 12, 1986.

On November 10, 1986, the Debtors opted to file a Motion for Summary Judgment, accompanied by their personal Unsworn Declarations. Coincidentally, two (2) days later, the United States Supreme Court filed one of the initial Opinions of the term, Kelly v. Robinson, ___ U.S. ____, 107 S.Ct. 353 (1986), which reversed the Debtors' principal supporting authority, In re Robinson, 776 F.2d 30 (2d Cir. 1985). Therefore, we issued an Order according the Debtors an opportunity to address the pertinence of Kelly v. Robinson in a Supplemental Brief to be filed on or before November 28, 1986, and holding the December 12, 1986, date as the deadline for DPW's reply. On November

20, 1986, the Debtors directed a letter to the Court addressing the impact of the Supreme Court's decision in lieu of a Supplemental Brief.

On December 12, 1986, DPW opted to file a Cross-Motion for Summary Judgment, attaching thereto an Unsworn Declaration of Mary B. Sieverling, Assistant Counsel for DPW.

The parties, by their Cross-Motions for Summary Judgment, indicate agreement that there are no genuine issues of material fact to be resolved in the disposition of these cases, and the Court also agrees that this matter is appropriate for disposition in this procedural manner per Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56. This Court therefore need not and will not make separate Findings of Fact,

but shall herein fill out the record by reference to uncontested averments in the respective Unsworn Declarations accompanying the Cross-Motions for Summary Judgment.

On June 18, 1985, JOHNSON-ALLEN pleaded guilty to four (4) counts of welfare fraud for receiving $6,300.00 in unauthorized benefits between April 11, 1980, and October 30, 1982. The sentence of the said Debtor was probation and repayment of the $6,300.00 in payments of $10.00 monthly from July, 1985, to December, 1985, and $20.00 monthly thereafter. The said Debtor made all of these payments through her filing date. Shortly thereafter, both she personally and her counsel, by letter, advised DPW and the County Probation Department of her bankruptcy filing and indicated that they believed that the bankruptcy stayed

collection of the restitution obligation, which would be covered by her Chapter 13 Plan and hence ultimately discharged in these proceedings upon completion of her Plan payments. Upon advice from the Probation Department that it did not accept the reasoning of her or her Counsel and advice that she would "get in trouble" if she ceased making payments, the said Debtor, upon advice of Counsel, resumed payments pending disposition of this proceeding.

The facts of STEFFLER's matter are similar, and are hence recited only when divurgent from the facts relating to JOHNSON-ALLEN. On January 17, 1984, STEFFLER pleaded guilty to welfare fraud which occurred between June 8,1979, and June 11, 1981. The said Debtor was similarly placed on probation and ordered

to make restitution in the amount of $5,506.64 at the rate of $20.00 monthly, probably commencing in early 1984. It should be noted that STEFFLER listed DPW as a creditor in the amount of $18,000.00 and that DPW filed a Proof of Claim in this amount, indicating that she probably had received sums in addition to those ordered to be repaid in her sentence of restitution. The said Debtor and her Counsel, by certified letter, indicated to the County Probation Department, shortly after the filing, that STEFFLER would cease payments because of her intention to deal with this obligation in her Chapter 13 Plan. Despite subsequent correspondence from Counsel citing the decision in In re Robinson, the County District Attorney scheduled a probation violation hearing for the said Debtor. At this point, upon advice of Counsel, STEFFLER resumed her payments.

The starting point of our discussion is that section of the Bankruptcy Code setting forth the scope of debts covered by a Chapter 13 discharge, which is as follows:

> § 1328. Discharge
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> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
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> (1) provided for under section 1322(b)(5) of this title; or
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> (2) of the kind specified in section 523(a)(5) of this title. (emphasis added)

This provision, pertinent to Chapter 13 discharges, can be contrasted with the exceptions to discharge cited in 11 U.S.C. § 523(a), pertinent to discharges pursuant to Chapter 7 and 11,

and Chapter 13 "hardship" discharges pursuant to 11 U.S.C. § 1328(b). Among the exceptions cited in 11 U.S.C. § 523(a) is, in 11 U.S.C. § 523(a)(7), an exception for "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit," including certain tax liabilities.

In Kelly v. Robinson, the Supreme Court resolved a previous split among court decisions, the most prominent of which was the Second Circuit Court of Appeals decision to the contrary, which it reversed, as to whether 11 U.S.C. § 523(a)(7) prevented discharge of restitution imposed in connection with a state criminal sentence in a Chapter 7 bankruptcy case. However, albeit with certain language which is not comforting to the position

of the Debtors here, the Court, apparently intentionally, left open the question as to whether such restitution is a "debt" (and it, might be added, fines or court costs imposed on criminal defendants as well), and hence whether such obligations are dischargeable in a Chapter 13 bankruptcy case.

It is clear to us that, except for the issue of whether charges imposed in a criminal case are a "debt" and whether, concomitantly, the state prosecutorial bodies and/or the victims of crimes who are designated as recipients of restitution have a "claim" against the criminal defendants, the contentions of DPW set forth herein can be dismissed summarily.

The first contention, that the restitution obligation of the Defendants

is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), or (a)(7), as DPW apparently concedes in its Brief, has no merit, because these provisions apply only to Chapter 7 cases, and the instant cases are maintained pursuant to Chapter 13. This principle, if not clear from a reading of the Code itself, is emphasized in such cases as In re DeSimone, 25 B.R. 728, 729 (E.D.Pa. 1982), where our district court, in a bankruptcy appeal, states that

> debts under [another section of 11 U.S.C. § 523(a)] are not included in the list of debts which are not dischargeable under 11 U.S.C. § 1328(a). The law is clear . . . that debts which fall within the scope of [§ 523(a)] may still be discharged pursuant to 11 U.S.C. § 1328(a).

This principle is also enunciated, specifically as to 11 U.S.C. § 523(a)(7), by Judge Goldhaber in his

recent decision in In re Smith, 58 B.R. 78, 80-81 (Bankr. E.D.Pa. 1986), rev'd on other grounds, 66 B.R. 244 (E.D.Pa. 1986), as follows:

> The dischargeability in bankruptcy of an individual's debts is determined, in part, by reference to 11 U.S.C. § 523. The discharge of an individual in chapter 7 or 11 is limited by the ten subsections of § 523(a), 11 U.S.C. §§ 727(b) and 1141(d)(2). The discharge in a chapter 13 case discharges a debtor from all debts under 11 U.S.C. § 502 except certain long term debts or debts of the type specified in § 523(a)(5) (alimony, maintenance or child support). 11 U.S.C. § 1328(a). A criminal fine, such as one issued by a traffic court, would be excepted by an individual's chapter 7 or 11 discharge according to 11 U.S.C. § 523(a)(7) while a debtor would be exonerated from paying such a debt under the terms of a chapter 13 discharge.

Cases consistent with this result include the following: In re Sturgeon, 51 B.R. 82 (Bankr. S.D.Ind. 1985) (liability incurred by debtor while motorist intoxicated by alcohol, excepted by 11

U.S.C. § 523(a)(9)); In re Richards, 50 B.R. 339 (Bankr. D.D.C. 1985) (federal income tax liability); In re Young, 10 B.R. 17 (Bankr. S.D.Cal.) (traffic fines); and In re Hudson, 9 B.R. 363. (Bankr. N.D.Ill. 1981) (welfare fraud claims).

There are, moreover, important logical reasons for treating debtors in cases maintained under Chapter 13 differently from those in cases maintained under Chapter 7 which are relevant to our disposition here. In a Chapter 13 case, the debtor is obliged to make periodic payments to a Trustee, who will distribute the funds received to all creditors who file allowed Proofs of Claim. See 11 U.S.C. § 1322(a). The Plan must, inter alia, be proposed good

faith, see 11 U.S.C. § 1325(a)(3),[2] and, upon the objection of either the Trustee or an unsecured creditor, the Plan must provide "that all of the debtor's projected income in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan," 11 U.S.C. § 1325(b)(1)(B). Further, the trustee or any unsecured creditor can move to increase the payments if the financial circumstances of a debtor change for the better during the course of the plan period. 11 U.S.C. §1329(a). Morever,

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[2]See In re Gathright, Bankr. No. 86-02118K, slip op. at 16, 18 (Bankr. E.D.Pa., Opinion filed Nov. 24, 1986), where we observed that the dishonesty of the Debtor in acquiring a debt and the fact that the debt may be non-dischargeable in a Chapter 7 case are not badges of "bad faith," per 11 U.S.C. § 1325(a)(3).

any creditor has a right to attend the Meeting of Creditors, interrogate the Debtor, and file Objections to the Plan if the creditor believes that it is not in compliance with the Code in any way. Thus, prosecuting authorities, as well as recipients of restitution orders, both of whom should be listed as creditors by the careful debtor, would have an opportunity to contest, inter alia, the debtor's ability to pay a larger percentage of his or her income towards the claim than proposed under a plan. Therefore, it is logical for the Code to provide, as it does, that consideration of whether a debt would be nondischargeable in a Chapter 7 case, per 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), or (a)(7), is entirely irrelevant to the determination of whether an

obligation is dischargeable in a Chapter 13 case. See In re Ellis, 66 B.R. 821 (N.D.Ill. 1986).

The third ground invoked by DPW as a basis for its position that the Defendants' obligation is nondischargeable, i.e., the Eleventh Amendment, can similarly be disposed of summarily. As the Court of Appeals recently held in In re Vasquez, 788 F.2d 130, 132 (3d Cir. 1986), the Bankruptcy Code, at 11 U.S.C. § 106(c), which has been the subject of "broad interpretation," contains a waiver of sovereign immunity. See also Gardner v. Pennsylvania Dep't of Public Welfare, 685 F.2d 106 (3d Cir.), cert. denied, 459 U.S. 1092 (1982). As the Court points out in Vasquez, in other instances, the courts have not been shy about discharging obligations to repay

government benefits which debtors were overpaid. See Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984).[3]

We therefore turn to the difficult issue presented by this case, i.e., whether the restitution obligations of the Debtors to DPW constitute "claims." We note that, prior to the decision of the Supreme Court in Kelly v. Robinson we could locate no generally-reported Chapter 13 case decision in which a court had held that criminal restitution (or other fines and penalties

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[3]We would, moreover, be hard-pressed to label the fraud of indigent persons seeking to recover additional benefits to provide necessities to their families, like the Debtors here, as more culpable than any other acts of fraudulent misappropriation by debtors. Nor is the government necessarily a more sympathetic victim than private fraud victims.

imposed in a criminal case) were not "claims" and hence not dischargeable. The question is whether the Court's dictum in Kelly v. Robinson in which it states that it has "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Bankruptcy Code, 107 S.Ct. at 361, casts a sufficient shadow to overrule all prior decisions and the policy arguments expressed hereinbefore to the contrary. We think not.

We note at the outset that both the Second Circuit Court of Appeals and the Supreme Court devoted far more attention to the issue of whether the restitution claim in issue was a "debt" or "claim" than they did to the ultimately decisive issue of whether 11 U.S.C. § 523(a)(7) applied to restitution. Nevertheless, the Court refuses

to rest its decision on the issue of whether restitution is a "claim," but rather follows the language quoted at 107 S.Ct. 361 above by expressly stating that "we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of criminal sentence." This holding specifically limits the scope of Kelly v. Robinson to Chapter 7 cases to which, as is indicated above, § 523(a)(7) exclusively applies. Moreover, it can scarcely be doubted that the Court was aware that its chosen basis for its ruling did not extend the scope of its decision to Chapter 13 cases, as the dissent expressly points out that the Court's approach leaves this issue open. See 107 S.Ct. at 366 n.6.

The Court, in its decision, relied heavily upon precedent under the Bankruptcy Act which held that criminal penalties were not dischargeable in bankruptcy, which it found, by its silence, Congress had implicitly meant to be read into the Code, and by the "'fundamental policy against federal interference with state criminal prosecution'" arising from Younger v. Harris, 401 U.S. 37, 46 (1971). Id. at 36[illegible]. See also In re Davis, 691 F.2d 176, 179 (3d Cir. 1982).

We do note that the Court's reliance on the principle that the Code reflected an intention to accept the precedent under the Act which established the definition of "debt" is strained. The Code merely states that "'debt' means liability on a claim." 11 U.S.C.

§ 101(11). It would seem that the analysis of the definition of a "debt" should then lead to the consideration of the definition of "claim," Which appears at 11 U.S.C. § 101(4) as follows:

> (4) "claim" means--
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> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

In Ohio v. Kovacs, 469 U.S. 274, 278-80 (1985), the Court, by contrast, focuses on the definition of "claim" rather than the term "debt," and recites convincing legislative history

for the proposition that Congress, in the Code, drafted a far broader definition than was set forth in the cases interpreting the Act and hence that "Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision . . . when it desired to do so." Id. at 279.

Thus, Collier, in describing the Code definition of "claim," states that "[t]he effect of the definition is a significant departure from prior law," and that "[t]he Code defines the term much more broadly" than did the Act. 2 COLLIER ON BANKRUPTCY, § 101.04, at 101-19 (15th ed. 1986). The only limitation from the intention "to give 'claim' the broadest interpretation," which Collier notes in support of the statement of the Court in Ohio v. Kovacs

that it "knew how to limit the application of a provision when it desired to do so," is the specific exception in § 101(4)(B) as to "an equitable remedy for a breach of performance with respect to which such a breach does not give rise to a right to payment." Id. at 101-21 (emphasis added).

Another source of Code support for an absence of Congressional intention to exclude all criminal penalties from bankruptcy discharge is, ironically, § 523(a)(7) itself, which excepts from its scope not only sums which are "not compensable for actual pecuniary loss," but also any sum otherwise within the scope of § 523(a)(7) "imposed with respect to a transaction or event that occurred before three years before the

date of the filing of the petition" (emphasis added).[4] It is difficult to understand what purpose Congress would have served by exempting criminal penalties less than three (3) years old from discharge if it meant to exempt all such penalties from discharge.

Although the Briefs of both parties were of very little assistance to the Court in its endeavor to do so, we have researched numerous cases touching upon the issue of the response

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[4]It should be noted that, in contrast to the facts presented in Kelly v. Robinson, where the debtor filed her bankruptcy petition within three (3) months of her conviction, the criminal penalties assessed against the Debtors here were dated and could apparently have been discharged, even in a Chapter 7 case, under the terms of 11 U.S.C. § 523(a)(7)(B).

of courts to arguments and counter-arguments that bankruptcy filings did or did not affect criminal penalties, usually in the context of "bad check" cases. As we noted above, we have discovered a variety of responses from courts in Chapter 7 and Chapter 11 cases, but a uniformity in the reported Chapter 13 cases holding that criminal penalties were dischargeable. We do not believe that, in Kelly v. Robinson, the Court meant to overrule all of these decisions.

We acknowledge a number of Chapter 7 cases holding that the obligation of a debtor to pay restitution is not a "debt." Most notable is In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985), which, because it involves a debtor convicted of welfare

fraud in this Commonwealth, like the Debtors here, demands a subsequent extended discussion. Other cases reaching a similar conclusion are In re Vik, 45 B.R. 64 (Bankr. N.D.Iowa 1984); In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); In re Magnifico, 21 B.R. 800 (Bankr. D.Ariz. 1982); and In re Button, 8 B.R.692 (Bankr. W.D.N.Y. 1981). Interestingly, all of these cases rely exclusively on the issue which the Supreme Court, in Kelly v. Robinson, indicated that it need not decide, i.e., whether the criminal penalties were a "debt," and, of these cases, only Pellegrino relies, even in the alternative, on the conclusion that 11 U.S.C. § 523(a)(7) prevents the discharge of a debtor's restitution obli-

gation, which is of course the ultimate basis for the ruling in Kelly v. Robinson.

An almost equal number of Chapter 7 cases hold to the contrary. These include In re Farrell, 43 B.R. 115 (M.D.Tenn. 1984) (district court modifies order of bankruptcy court enjoining entire criminal proceeding and merely enjoins prosecutor and crime victim from seeking restitution); In re Vandrovec, 61 B.R. 191 (Bankr. D.N.D. 1986)(restitution to United States Commodity Credit Corporation held dischargeable); In re Vohs, 58 B.R. 323 (Bankr. D.Mass. 1986) (restitution held dischargeable on consideration of, inter alia, § 523(a)(7) objections to dischargeability by crime victim); In re Brown, 51 B.R. 57 (Bankr. E.D.Ark. 1985)(crime

victim enjoined from receiving restitution); In re Allman, 43 B.R. 840 (Bankr. D.Colo. 1984) (prosecutor enjoined from seeking to revoke debtor's probation for failure to pay restitution); In re Brown, 39 B.R. 820 (Bankr. M.D.Tenn. 1984) (prosecutor enjoined from seeking restitution and crime victim enjoined from seeking restitution); In re Redenbaugh, 37 B.R. 383 (Bankr. C.D.Del. 1984) (crime victim enjoined from seeking restitution); In re Curly, 25 B.R. 260 (Bankr. E.D.Pa. 1982) (one of several decisions of former Chief Judge Goldhaber of this Court which enjoins criminal proceedings per 11 U.S.C. § 105(a) where it is found that the nature of the proceeding was to collect a debt); In re Strassmann, 18 B.R. 346 (Bankr. E.D.Pa. 1982)(per TWARDOWSKI, J.)(crime victim enjoined

from continuing or commencing criminal proceedings against debtor).

The few Chapter 11 cases located, which are subject to the same dischargeability provisions as Chapter 7, 11 U.S.C. § 1141(d)(2), similarly produce a mixed result. In In re First Texas Petroleum, Inc., 52 B.R. 322 (Bankr. N.D. Tex. 1985), the court denies an injunction and suggests that the bankruptcy courts cannot restructure a state criminal sentence. However, in In re Landstrom Distributors, Inc., 55 B.R. 390 (Bankr. C.D.Cal. 1985), the court holds that the automatic stay protects the debtor from collection of fines, and in In re Ohio Waste Services, Inc., 23 B.R. 59 (Bankr. S.D.Ohio 1982), the court enjoins both the prosecutor and the crime victim from proceeding to attempt to collect restitution from the debtor.

We have, however, located five (5) generally reported cases which raise the issue of collection of criminal penalties in Chapter 13 cases. Unlike cases under the other Chapters, these cases are uniform in providing at least some relief to the debtors involved in these cases, as follows: In re Gilliam, 67 B.R. 83 (Bankr. M.D.Tenn. 1986) (criminal penalties held to be debts subject to "discharge injunction" of 11 U.S.C. § 524, although not subject to 11 U.S.C. § 362). In re Heiney, 58 B.R. 930 (Bankr. C.D.Cal. 1986)(prosecutor enjoined from collecting restitution; crime victim of embezzlement held to have no enforceable claim against debtor); In re Holden, 26 B.R. 789 (Bankr. M.D.Tenn. 1982) (crime victim enjoined from accepting restitution); Lawson v. Boczonadi, 22 B.R. 100 (Bankr.

S.D.Ohio 1982) (crime victim enjoined from receiving restitution, but not from testifying against debtor in criminal proceeding); In re Barnett, 15 B.R. 504 (Bankr. D. Kan. 1981) (court refused to issue injunction, but declared that bankruptcy stays collection of restitution). Cf. In re Ellis, supra (welfare department enjoined from maintaining civil action to recover overpayments).

We believe that it is not coincidental that courts faced with Chapter 13 cases would find criminal restitution to be dischargeable because of the very significant difference in the broad Chapter 13 discharge, justified, as indicated above, by the consideration that, in a Chapter 13 case, the crime victim is to be the recipient of at least a portion of the payments to which he is due. Several

considerations which are starkly emphasized in the context of a Chapter 13 case bring this out. One is the concept that the entry and enforceability of a restitution order are dependent upon the ability of the defendant to pay. See Commonwealth v. Walton, 326 Pa.Super. 492, 494, 474 A.2d 348, 349 (1984); and Commonwealth v. Valent, 317 Pa. Super. 145, 149-50, 463 A.2d 1127, 1129 (1983). Hence, restitution is payable only if the defendant has funds available to pay in any event. The supervision of the bankruptcy court over the remittance of plan payments may, in practical terms, result in more significant payments to crime victims than they might otherwise realize.

Another consideration is the concept that no creditors, irrespective of the nature of the debts owed to them, should be granted a preference or a priority over any other creditors. A third is recognition that, if the debtor is already paying all of his disposable income into a plan, it is theoretically and practically impossible that he will have anything left over to pay towards restitution. All of these considerations add up to the conclusion that the crime victim must share, with other creditors, acceptance of only that which the debtor is financially able to pay. Melding these considerations with a final consideration - that a Chapter 13 debtor is to receive the broadest "fresh start" possible, a concept deeply regarded since Local Loan Co. v. Hunt, 292 U.S. 234 (1934) - leads to the unmistakeable

conclusion that the foregoing Chapter 13 cases are correct in requiring that repayment of financial penalties arising from criminal proceedings must be a part of the debtor's Plan, along with the debtors' other legitimate debts.

As we indicated earlier, we are obliged to give a more extended discussion of the decision in Oslager, supra, as it does involve a very similar claim by DPW to that made here, although in the context of a Chapter 7 case. We believe that the result there, while consistent with the decision in Kelly v. Robinson and hence correct on its facts, should not be carried over to the facts of the instant matter.

We disagree with several conclusions stated by Judge Gibbons in that case, which were unnecessary to the result attained.

First, we do not agree that the purpose of restitution, per 18 Pa. C.S. § 1106, the pertinent section of the Pennsylvania Crimes Code, is solely to rehabilitate the offender rather than to, in addition, compensate the victim. The case quoted by Judge Gibbons for this principle, Commonwealth v. Wood, 300 Pa.Super. 463, 467, 446 A.2d 948, 949-50 (1982), does not, with all due respect, so hold. Rather, the court holds that, in entering orders of restitution, the state courts must consider the following four (4) factors:

> (1) the amount of the loss suffered by a victim; (2) the fact that such loss was caused by conduct of the defendant; (3) that the amount awarded does not exceed the defendant's ability to pay; and (4) the type of payment that will best serve the needs of the victim and the capabilities of the defendant. . . .

See also, e.g., Commonwealth v. Valent, 317 Pa.Super. 145, 149, 463 A.2d 1127, 1128 (1983). The first, second, and fourth considerations all relate to compensation of the loss suffered by the victim as a result of the crime, rather than or in addition to rehabilitation of the offender. See Commonwealth v. Balisteri, 329 Pa.Super. 148, 154-58, 478 A.2d 5, 8-10 (1984) (court must frame restitution award to measure compensable damages of victim). It is our belief that the purported purpose of the Crimes Code should not be a factor at all but, to the extent that it is, we cannot agree that compensation of the victim is not at least one of the principal purposes of restitution.

Secondly, we do not agree that a conclusion that restitution (or criminal fines and penalties) are dischargeable necessarily violates the principles of equity, comity, and federalism set forth in Younger v. Harris, supra. Instead, we believe that the Third Circuit Court of Appeals, in In re Davis, has set forth the path that bankruptcy courts must follow in framing relief in such matters which is consistent with the considerations in Younger v. Harris. We intend to adhere to the teachings of Davis in framing relief.

Finally, we believe that Judge Gibbons was influenced by the fact that the debtor, in Oslager, filed a Chapter 7 case to attempt to completely discharge her obligation within a month of

her having pleaded guilty of welfare fraud. Principles established in such a factual setting should not necessarily carry over to debtors who, after making considerable payments, seek an adjustment of their restitution obligation via a Chapter 13 Plan, like the Debtors here.

We therefore conclude that not only did the Supreme Court, in Kelly v. Robinson, not rule that criminal financial penalties were not dischargeable in a Chapter 13 bankruptcy, but it is unlikely that the Court, taking all of the foregoing considerations into account, would do so. Thus, we shall not do so and rule that the restitution due from the Debtors here is dischargeable in their Chapter 13 Plans and that the Debtors, and not DPW, are entitled to summary judgment.

Still remaining for disposition are the issues of the Counterclaims of the Debtors and the relief to be granted. Since we conclude that the Debtors' restitution payments are dischargeable debts, it is clear that the payments by the Debtors to the Probation Department, which undoubtedly have been or will be remitted to DPW subsequent to their respective filings, were postpetition transfers within the scope of 11 U.S.C. §§ 549(a)(1) and (a)(2)(B).

However, DPW questions whether, irrespective of this fact, the Debtors, as opposed to the Trustee, may avoid the transfers per 11 U.S.C. §§ 522(h) and (g)(1)[4] because it is contended that

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[4]These Code sections provide as follows:

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

> (g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--
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> (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
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> (B) the debtor did not conceal such property; . . .
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> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--
>
> (1) such transfer is avoidable by the trustee under
>
> section 544, 545, 547, 548, 549, or 724(a) of this title or

(FOOTNOTE CONTINUED)

the Debtors made a "voluntary choice" to continue their restitution payments post-filing, and hence that the transfers were "voluntary." In the instant factual settings, we cannot agree. It is established in this Court that only when a debtor effects a transfer voluntarily when he acts

> "free from the persuasive influence of another . . . of her own free will to transfer property to the creditor. . . . [and] not . . . where a creditor has harassed, insulted or shamed a debtor into transferring property to the creditor." In re Seidel, 27 B.R. 347, 351 (Bankr. E.D.Pa. 1983) (per TWARDOWSKI, J.) (quoting In re Reaves, 8 B.R. 177, 181 (Bankr. D.S.D. 1981).

(FOOTNOTE CONTINUED)

> recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer.

See also In re Taylor, 8 B.R. 578 (Bankr. E.D.Pa. 1981) (per GOLDHABER, J.)

In Seidel the husband-Debtor undoubtedly voluntarily returned an encumbered truck, but this court held that his ignorance that his act of doing so would cause him to lose his equity in the truck rendered the transfer involuntary for purposes of setting aside the transfer by means of § 522(g)(1). In Reaves, the Debtor voluntarily signeda mortgage in favor of a bank to secure a debt of her husband, but the court held that the fact that she was pressured to do so by a bank employee (the only element of "pressure" was, apparently, repeated but businesslike requests that she do so) rendered this transfer "involuntary." In Taylor, the Debtor made a payment on a

debt only after harassment from a collection agency. Judge Goldhaber held that such a payment, not made by the Debtor of her own unfettered free will, was "involuntary" for purposes of 11 U.S.C. §§ 522(g)(1) and (h).

Here, it is apparent that the only "choice" which the Debtors had was to resume making payments to the Probation Department or face incarceration. The mere possibility that incarceration would result if the payments were not made we hold to be sufficient to render the payments involuntary. The facts here, where the Debtors stopped payments and resumed only when they and their counsel were unable to convince the Probation Department that, under the circumstances, payments should not be remitted, present, to our thinking, the

strongest possible case that the transfers were involuntary. Compared to the instant facts, the "pressure" put upon the debtors in Taylor and Reaves was de minimis.

Therefore, we are forced to conclude that the Debtors may set aside the postpetition transfers to DPW.

However, in framing an Order here, we must be sensitive to the interests of comity, equity, and federalism, per the Davis decision, and we must be assured that the result will be consistent with the scheme established in the administration of Chapter 13 bankruptcies. We shall therefore, at this time, refrain from issuing any injunction directed at either the County Probation Department or DPW. Like the Davis court, "[w]e decline to presume" that the County Probation Department and

DPW "will disregard the obligation imposed upon them by the federal Constitution" to heed the orders of this Court. See 691 F.2d at 178. We shall act further only if these parties do not heed our directives as to their obligations in light of this Opinion. Accord: In re Gilliam, supra, 67 B.R. at 87.

We also decline the invitation of the Debtors to hold DPW in contempt. In Allman, supra, the contempt remedy was rejected because the criminal proceeding was not enjoined, and in Redenbaugh contempt was withheld because of the absence of bad faith on the part of the crime victim. Here, we also decline to enjoin the state court proceedings, and we find no evidence of bad faith on the part of DPW. This is obviously an area of the law in which

the applicable principles are not settled and, although DPW's failure to cite Oslager may indicate its lack of reliance upon it, we cannot overlook the presence of a case so analogous in its closely factual matrix to the case at bar in which an eminent jurist appears to have reached a conclusion contrary to that reached by us. Of course, we fully anticipate the cooperation of DPW in any other similar matters before us in the future now that our views have been expressed, and different consequences would ensue if DPW repeated this conduct as to other Chapter 13 debtors in the future.

For the foregoing reasons, we also decline to find DPW's conduct, although possibly in violation of the

automatic stay, characterized by the element of willfulness, which is required to impose damages under 11 U.S.C. § 362(h).

The only remedy we shall order is that DPW remit the postpetition payments which it has or will receive to the Chapter 13 Trustee, to be distributed in accordance with the Debtors' respective Plans. We shall also accord DPW a thirty-day extension of the time to file a Proof of Claim in the JOHNSON-ALLEN case, which, unlike the STEFFLER case, we note has not been done even though the bar dates have passed. We believe that so ordering, in circumstances where a creditor in good faith believed that such a filing would be unnecessary would be "in the interest of justice and . . . will not unduly delay the administration"

of these cases, per Bankruptcy Rule 3002(c)(2).

An Order accomplishing the foregoing will be entered.

/s/
DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE
3722 United States Court House
Philadelphia, PA 19106-1763

Dated at Philadelphia, PA,
this 23rd day of January, 1987.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: LORRAINE JOHNSON-ALLEN Debtor	:	Chapter 13 Bankruptcy No. 86-01239K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE Plaintiff	:	Adversary No. 86-0463K
v. LORRAINE JOHNSON-ALLEN Defendant	:	
In re: RUBY STEFFLER a/k/a INGRID J. STEFFLER Debtor	:	Bankruptcy No. 86-00205K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE Plaintiff	:	
v. RUBY STEFFLER a/k/a INGRID J. STEFFLER Defendant	:	Adversary No. 86-0464K

O R D E R

AND NOW, this 23rd day of January, 1987, upon consideration of the Cross-Motions of the parties for Summary

Judgment, the pleadings, and the Unsworn Declarations and the Briefs submitted by the parties, it is hereby ORDERED AND DECREED as follows:

1. The Plaintiff's Motion for Summary Judgment in these matters is DENIED, and the Debtors' Motion for Summary Judgment is GRANTED in part.

2. It is declared that the restitution obligations of the Debtors to DPW are dischargeable debts, and the parties are directed to proceed in accordance with this declaration hereinafter.

3. DPW shall remit all postpetition payments received by it now or in the future on account of the Debtors' restitution obligations to the Standing Chapter 13 Trustee, James J. O'Connell, Esquire, within twenty (20) days from this Order or upon ten (10) days from receipt of same.

4. DPW shall be accorded an extension of time until February 20, 1987, to file a Proof of Claim in the JOHNSON-ALLEN bankruptcy case.

5. All requests of the Debtors for relief in the nature of contempt or pursuant to 11 U.S.C. § 362(h) are DENIED, without prejudice to the Debtors to seek such relief in the future if DPW does not proceed in accordance with the accompanying Opinion.

/s/
DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE
3722 United States Court House
Philadelphia, PA 19106-1763

SEE MAILING LIST ATTACHED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 28, 1989

TO: David A. Searles, Esq.*
Eric L. Frank, Esq.

Mary B. Seiverling, Esq.*

Harris R. Brumberg, Esq.
Michael A. Klimpl, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos. 88-1610 & 881635 and copies are enclosed herewith.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1610 and 88-1635

In re: LORRAINE JOHNSON-ALLEN

Commonwealth of Pennsylvania
Department of Public Welfare

v.

LORRAINE JOHNSON-ALLEN
In re: RUBY STEFFLER a/k/a
INGRID J. STEFFLER
Commonwealth of Pennsylvania
of Public Welfare Department

v.

RUBY STEFFLER A/K/A INGRID J. STEFFLER,
LORRAINE JOHNSON-ALLEN and RUBY STEFFLER,
Appellants

In re: EDWARD and DEBORA DAVENPORT
Edward and Debora Davenport

v.

Commonwealth of Pennsylvania,
Department of Public Welfare,
and Court of Common Pleas of
Bucks County, and Edward Sparkman,
Trustee, Edward and Debora Davenport,
Appellants

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENSBERG, HUTCHINSON, SCIRICA, COWEN NYGAARD, and ROSSEN, Circuit Judges

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.**

By the Court,

/s/
Chief Judge

DATED: April 27, 1989

*Senior Judge Rosenn as to panel rehearing only. ** Judges Greenberg and Hutchinson would grant rehearing.